

NEGOTIABLE COLLATERAL DAMAGE:
CIVIL LIBERTIES VERSUS NATIONAL SECURITY IN TIMES OF THREAT

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APPROVAL

The undersigned certify that this thesis meets masters-level standards of research, argumentation, and expression.

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DISCLAIMER

The conclusions and opinions expressed in this document are those of the author. They do not reflect the official position of the US Government, Department of Defense, the United States Air Force, or Air University.

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ABSTRACT

The United States, by virtue of its democratic system, finds itself torn at times between the defense of its physical security on one hand and the defense of civil liberties on the other. Through the democratic political process, the US government has developed a pattern of behavior for responding to threats to national security. This pattern of behavior includes six typical phases: *threat, othering, response, normalcy, restoration, and remorse.*

After detecting a threat to national security, the primary national identity shrinks to identify “others” who might support the enemy from within our borders. Othering permits a targeted response while not othering results in a broader response. Othering occurred against foreign-born citizens and resident aliens in the 1790’s, Japanese-Americans in the 1940’s, and American communists during the Second Red Scare. By contrast, othering did not occur against French loyalists in the 1790’s, secessionist sympathizers in the 1860’s, and radical Islamic terrorists after 9/11. Once the threat passes and normalcy resumes, the national identity expands again to encompass the previous “others” and the government restores civil liberties. Often, the process includes remorse over the action taken during the crisis. The pattern of restricting civil liberties in exchange for the perception of greater security is a result of the democratic process, which defines itself by majority, but not unanimous, opinion. This process of reducing civil liberties during times of threat provides evidence of the democratic process at work. Furthermore, othering a minority is less likely to occur in the future.

This study develops this theoretical framework through three brief case studies and then applies it to more in-depth examinations of the threats of communism during the Second Red Scare and the threat of radical Islamic terrorists after 9/11. It compares these case studies to draw conclusions about the government’s balance between civil liberties and national security during times of threat and suggests implications for future threats to national security.

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Introduction

Any society that would give up a little liberty to gain a little security will deserve neither and lose both.

Benjamin Franklin

The US government's domestic response to the terrorist attacks of 9/11 reinvigorated an ongoing debate on how far the government should go in restricting domestic civil liberties in the interests of national security. The United States has often redefined the scope of domestic civil liberties during a threat to national security. Examples include the Alien and Sedition Acts during the quasi-war with France, President Lincoln's suspension of the writ of habeas corpus during the Civil War, the Espionage Act of World War I, Japanese-American internment during World War II, outlaw of communist organizations during the Second Red Scare, and the USA PATRIOT Act after 9/11.¹ In essence, this has become a wartime defense mechanism, despite limited effectiveness. Narrowing the focus to two case studies provides insight into this defensive mechanism.

Research Questions

This study compares the government's balancing of domestic civil liberties against national defense in the contexts of threats from communism and terrorism, specifically post-9/11 Islamic terrorists. From that comparison, this study draws general conclusions about balancing liberty and security under threat.

Purpose

A strategist must understand the balance the government strikes between defense and liberty, since this balance helps inform strategic

¹ The USA PATRIOT Act, Public Law 107-56, is formally entitled the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001.

aspirations, operational objectives, and tactical operations in times of war and peace. Such a balance also illuminates wartime options not usually considered during peacetime planning. The range of traditional responses warrants analysis, from which suggests implications for future governmental responses to threats.

Methodology

This comparative analysis begins by building a model of traditional behavior with regard to the treatment of civil liberties during times of threat. It then looks at three brief historical examples to validate the model articulated. Next it examines two in-depth case studies: communism and terrorism. This help determine if the American practice of balancing civil liberties and national defense has changed as the threat has shifted, and also illustrates the differences in response between the two distinctive threats. This analysis derives from primary sources as available and secondary or tertiary sources as required.

This study also limits itself to the consideration of *domestic* civil liberties. As such, it avoids the ongoing debate regarding application of civil liberties to combat zones in other countries and the status and treatment of detainees abroad. Although important topics, they are beyond the scope of this study.

Key Terms

To ensure a solid foundation for this examination, it is first necessary to define the terms liberty and defense to ensure a common frame of reference. The term liberty brings several notions to mind, including civil liberties, personal freedoms, and constitutional rights. Yet, each term has a distinct nuance.

The National Security Strategy of the United States, most recently updated in May 2010, provides a good point of departure. Ironically, within the 52-page document the term 'liberty' occurs only five times,

while 'security' occurs 288 times.² The limited references to liberty also fail to define what those liberties entail. Consider, for example, the following excerpt: "Protecting civil liberties and privacy are integral to the vibrancy of our democracy and the exercise of freedom."³ While this clearly shows the high degree in which liberty is valued, the passage fails to explain the specifics of what that means, other than alluding to the fact that the notion of civil liberties are somewhat distinct from privacy.

The quest to define liberty naturally starts at the Constitution, but its text yields no easy answers since true meaning lies in context. Take, for example, free speech. While we recognize the value of free speech, we also recognize its limits, restricting, for example, prohibits screaming fire in a crowded building when there is no actual threat, making libelous comments, or inciting a mob to riot.

Perhaps the most well known author on the subject of liberty is John Stuart Mill, who first published *On Liberty* in 1859. In this seminal work, John Stuart Mill explored the issue of civil liberty, which he described as "the nature and limits of the power which can be legitimately exercised by society over the individual."⁴ Rather than a philosophical notion of liberty free from political context, the concern here is the nature of liberty within the context of a governed people; true freedom, after all, exists only in a state of anarchy.

In Mill's view, civil liberty results from the struggle between authority of the government on one hand and individual freedom on the other. For a democracy, this means the authority of the collective majority against the liberty of the individual. Thus, the only end worth restricting any individual liberty was for the self-protection of the

² President Barack Obama, "National Security Strategy of the United States," The White House, 2008.

³ Obama, "National Security Strategy of the United States."

⁴ John Stuart Mill, *On Liberty* (Chicago: Gateway Editions, Inc., 1955), 1.

collective.⁵ As this study will show, the three most often restricted civil liberties during times of war fall within the First, Fourth, and Fifth Amendments to the Constitution.⁶ Respectively, these address freedom of speech, freedom against unlawful searches and seizures (privacy), and freedom from loss of life, liberty, and property without due process. During times of threat, the government often forsakes free speech, reasonable searches, and due process for the individual in the name of protecting the security of the collective. Thus, liberty refers to the civil liberties supported in principle through the Constitution's Bill of Rights but applied through the varying interpretations of the executive, legislative, and judicial branches of government.

Defense, on the other hand, is fairly straightforward—it refers to the protection or securing of something, but defense cannot exist without its objective. In other words, what is being protected or secured?

Maslow's hierarchy of needs is one perspective through which to view the concept of defense. In his influential work, "A Theory of Human Motivation," published in 1943, Maslow theorized five hierarchical types of needs: physiological, safety, love, esteem, and self-actualization.⁷ For the individual, defense protects the ability to satisfy these five needs.

In his book *Social Theory of International Politics*, Alexander Wendt provides a variation of Maslow's hierarchy of needs in regards to a group rather than an individual. This allows application of Maslow's theory to a political entity such as the United States. These five hierarchical needs include physical security, ontological security, sociation, self-esteem, and transcendence.⁸ For the state, the most basic needs are those of its

⁵ Mill, *On Liberty*, 13.

⁶ Although Americans continually debate application of the Second Amendment, this debate rarely changes due to threats to national security; thus, this study does not reference this issue.

⁷ A. H. Maslow, "A Theory of Human Motivation," *Psychological Review*, Vol. 50 (1943): 370-396.

⁸ Alexander Wendt, *Social Theory of International Politics*, Cambridge Studies in International Relations (Cambridge, NY: Cambridge University Press, 2006), 132.

physical security; in other words, its continued existence. Thus, the reaction to an existential threat is the most pronounced. Protecting principles, or the so-called American way of life in this case, is at the bottom of the hierarchy of needs, falling into the realm of self-esteem and transcendence. The framers of the Constitution appreciated this, sacrificing some degree of security for individual liberties and establishing checks and balances between the branches of government to preserve those liberties. Thus, it comes as no surprise that the government cherishes the Constitution in times of peace but quickly compromises it when baser needs such as physical security are threatened. In short, sacrificing civil liberties is a defensive mechanism. But, are there times when the government takes this defensive mechanism too far?

In the book *War and Liberty*, Geoffrey Stone argued that the United States has historically gone farther than it should in restricting civil liberties during times of war.⁹ He noted that a threat generates fear that causes the people to “insist that our leaders protect us, and elected officials, often distressed themselves, quickly respond.”¹⁰ He contended that these responses are “severe *overreactions* based on exaggerated and ill-informed fear” (emphasis in original).¹¹ The basis of his argument is that remorse is an indicator of immoral behavior, observing that after the crisis we later regret the actions taken to limit liberties.¹²

This study challenges Stone’s conclusion that the United States goes too far with regards to civil liberties and proposes an intellectual framework for analyzing actions taken by the state during times of crisis. In contrast to Stone, outputs of a functioning democratic process cannot, by definition, be excessive by virtue of the authority the masses give their

⁹ Geoffrey R. Stone, *War and Liberty: An American Dilemma: 1790 to the Present* (New York: W.W. Norton, 2007), 166.

¹⁰ Stone, *War and Liberty*, 167.

¹¹ Stone, *War and Liberty*, 168.

¹² Stone, *War and Liberty*, xvii.

elected officials. As long as the political process continues to function through open and fair elections, the actions of the elected officials represent the wishes of the public, who also decide the appropriate balance between civil liberty and national security. In other words, the people elect officials to make decisions on their behalf. At times, the American people are willing to sacrifice a measure of liberty for security and that is a choice the American people should be able to make. When the US government restricts liberties, for example, it does so through some part of the democratic process, either through executive order, policy, or legislation.

The dilemma of civil liberties is that people often choose not to sacrifice their own liberties but rather choose to sacrifice the liberties of a minority that lacks the electoral power to protect its rights. This is where judicial oversight becomes important. By ruling on the legality of actions by the executive and legislative branches, judicial review ensures actions fall within socially constructed limits and adhere to principles within the Constitution's Bill of Rights. This is not to claim the Constitution exists in a vacuum; context still matters when it comes to interpretation and application. Hence, there is occasionally a need for constitutional amendments. Those who believe the government goes too far, like Geoffrey Stone, David Cole, and James Dempsey, use some arbitrary baseline for protection of civil liberties and fail to accept that context matters, even for the courts, when deciding the balance between civil liberties and national security. In short, the government cannot go either too far or too short in restricting civil liberties unless it takes actions outside the democratic process.

Overview

The first chapter details a theoretical American model of traditional responses to national security threats with regard to civil liberties. Chapter one also includes a brief look at some historical examples to validate that model. These examples include the Sedition Act of 1798,

President Lincoln's suspension of the writ of habeas corpus during the Civil War, and Japanese internment in the United States during World War II. Each of these examples demonstrates that the theoretical model is sufficient for analyzing the expanded case studies provided in chapters two and three.

Chapter two provides a more in-depth look at the threat of communism during the Second Red Scare. Although communism posed an external nuclear threat, the true internal threat was subversion. This chapter also shows how this historical episode follows the same historical pattern of balancing defense and liberty. It demonstrates the othering of American communists and resulting loss of civil liberties, particularly freedom of speech, to this targeted minority. Although Americans perceived the threat as significant, the loss of civil liberties applied only to a small minority.

Chapter three focuses on the threat of radical Islamic terrorists starting with 9/11. The most notable response to this threat was legislation known as the PATRIOT Act, pushed by the Bush Administration and quickly enacted by Congress. Unlike the previous case study, this time the government chose not to target a minority through othering. The government's response more broadly targeted the entire population through eased standards for both probable cause and electronic surveillance.

Chapter four compares the response to communism and post-9/11 radical Islamic terrorists. Comparing how these two threats hold up to the model of past behavior sheds some light on implications for future ideological security threats. The response to both threats had some similarities, but also varied in other ways. In short, not only is the character of these threats significantly different, the strategic context of American society also changed. However, there are significant similarities to draw some general conclusions regarding security versus liberty under threat.

Finally, chapter five offers some implications for future strategists on the challenge of balancing civil liberties with national security and provides final thoughts.

Chapter 1

Background

The US military's oath of enlistment and commissioned officer oath both require a pledge to "support and defend *the Constitution* of the United States against all enemies, foreign and domestic" (emphasis added).¹ This oath does not require a pledge to support and defend just the physical security of the United States, but rather to support and defend the principles that embody our ideals and values and the American way of life. The preamble of the Constitution encapsulates this concept:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence [sic], promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

The preamble's text reveals six clear objectives: 1) "form a more perfect Union"; 2) "establish Justice"; 3) "insure domestic Tranquility"; 4) "provide for the common defence [sic]"; 5) "promote the general Welfare"; and 6) "secure the Blessings of Liberty." While these objectives are often mutually compatible, they sometimes interfere with one another. The preamble shows no clear primacy for any one objective. Thus, the balance between these competing objectives can migrate over time, especially when transitioning from peace to threat. In particular, the relationship between providing defense and securing liberty varies greatly with the shift from peace to war and vice versa.

In times of peace, the balance leans towards liberty because security is not at stake. In times of crisis, defense must come first to protect the sovereignty of the state. Richard Posner, author of *Not a*

¹ Department of Defense Form 4; 5 US Code § 3331.

Suicide Pact, noted that, “In times of danger, the weight of concerns for public safety increases relative to that of liberty concerns, and civil liberties are narrowed. In safer times, the balance shifts the other way and civil liberties are broadened.”² The question then becomes, what are the consequences? Is a nation without certain liberties worth defending? Or better yet, does one risk being unable to return to a state of greater liberties after the threat passes? Is it possible to go too far as David Cole and James Dempsey claim in their book, *Terrorism and the Constitution*, where the government, “in the name of protecting national security, subvert[s] the very rights and liberties ‘which make the defense of the Nation worthwhile’”?³

This is not to imply that these competing priorities must be mutually exclusive. It is, after all, possible to maintain civil liberties without sacrificing national defense and vice versa. However, even threats from an armed foreign state can affect domestic civil liberties if the public perceives a portion of the threat as internal. The United States demonstrated this point during World War II and the half-war with France. Ideological threats such as communism and terrorism that have taken root and can grow and strike from within the country create even greater difficulties.

The purpose of this chapter is to explain a theoretical model of the traditional American response regarding civil liberties versus national security threats. It then provides historical examples to illustrate the traditional model by which the United States balances defense and civil liberties during times of crisis.

² Richard A. Posner, *Not a Suicide Pact: The Constitution in a Time of National Emergency* (New York; Oxford: Oxford University Press, 2006), 9.

³ David Cole and James X. Dempsey, *Terrorism and the Constitution: Sacrificing Civil Liberties in the Name of National Security*, 3rd ed. (New York: New Press, 2006), 2.

The Traditional American Pattern of Balancing Civil Liberties and National Security during Times of Threat

In the book *Not a Suicide Pact*, Richard Posner expounds on the interaction between the executive and legislative branches on one hand and the judicial branch on the other to examine the balance between civil liberties and national security. In his view, the Supreme Court determines the extent of peacetime civil liberties through its legal decisions. However, during threats to national security the executive branch limits civil liberties as it deems necessary. “Judges, knowing little about the needs of national security,” Posner claimed, “are unlikely to oppose their own judgment to that of the executive branch, which is responsible for the defense of the nation.”⁴

This study takes Posner’s argument further, detailing an even more specific pattern to the limiting of civil liberties during times of threat or crisis, by incorporating Alexander Wendt’s concept of “othering” as a mechanism to tailor the restriction of civil liberties when possible.⁵ Figure 1 graphically depicts this pattern.

The six phases within the traditional American response to balancing civil liberties and national security during times of threat or crisis are *threat*, *othering*, *response*, *normalcy*, *restoration*, and *remorse*. The first phase in this pattern occurs when a threat challenges national security. This can occur through a foreseen threat that builds gradually or a crisis. The threat of war with France in 1798, for example, built over time. On the other hand, specific events such as the Cuban Missile Crisis, Pearl Harbor, and 9/11 challenged national security virtually overnight. In short, a crisis is a largely *unforeseen* threat.

⁴ Posner, *Not a Suicide Pact*, 8-9.

⁵ Alexander Wendt, *Social Theory of International Politics*, Cambridge Studies in International Relations (Cambridge, NY: Cambridge University Press, 2006), 241.



Figure 1: Traditional American Pattern for Balancing Civil Liberties and National Security in Times of Threat

Source: Author's Original Work

The second phase in the traditional pattern of behavior begins with a stirring of nationalism to defend against this threat. In this phase, the nation attempts to refine its identity and isolate those outside this new and more narrowly construed identity. Alexander Wendt discusses this process of creating a cognitive difference between the “self” and “other.”⁶ He discussed the finding of “social identity theory” that uses cognitive differentiations to permit “discrimination against members of out-groups in favor of the in-group.”⁷ As Wendt noted, “This tendency is clearly manifested in the case of states, who depend politically on domestic

⁶ Wendt, *Social Theory of International Politics*, 241.

⁷ Wendt, *Social Theory of International Politics*, 241.

constituencies that clamor relentlessly for their own interests to be met before those of foreigners.”⁸ “Othering” describes this process.⁹ In the American past, “others” have included alien residents, Japanese-Americans, and American communists. Sometimes othering was not possible because the threat was not associated with a minority. This helps explain aspects of the response during the half-war with France and the Civil War. Finally, there are times when the government chose not to “other” a minority. This occurred after 9/11 when the government rejected othering Arabs and Muslims.

In the third phase, civil liberties are restricted as part of a response to the threat. If othering occurs, then a tailored response targets those “others.” If othering does not occur, by either circumstance or choice, then the response restricts civil liberties more broadly.

After averting the threat, which occurs in phase four, the government restores civil liberties in phase five. Sometimes, as in the Alien and Sedition Acts of 1798, lawmakers include an expiration date, thus reinforcing the notion that restricting civil liberties is only temporary for the purposes of meeting a challenge. Phase six, often involves remorse, regret, or redress for the actions taken – and can occur years if not decades later, as in the case of American internment of Japanese-Americans during World War II.

The first of the three historical examples considered in this study is the Alien and Sedition Acts of 1798. Since the focus of this study is on the response to the threat, phases four, five, and six are grouped under the collective label of “The Aftermath.”

The Alien and Sedition Acts of 1798

The United States ratified the Bill of Rights on 15 December 1791. The newly formed republic would get an early test in how to apply these

⁸ Wendt, *Social Theory of International Politics*, 241.

⁹ Wendt, *Social Theory of International Politics*, 241.

civil liberties before the end of the decade and would set an early precedent for the restriction of civil liberties when faced with a threat to national security.

The Threat

At the time of the 1796 presidential elections, the Federalist and Republican parties sharply divided the country. John Adams, a Federalist, won the presidential election by defeating Thomas Jefferson, a Republican.¹⁰

By 1798, the newly founded United States was preparing itself for war with France. The heart of the problem stemmed from the French army's growing power, its threat to England, and the United States' inability to maintain neutrality with both. A treaty between the Americans and British in 1794 ruffled French feathers and provoked a French campaign against American shipping in 1796.¹¹ Efforts to negotiate a similar treaty with the French turned sour in the notorious XYZ Affair when French agents demanded a bribe for the Foreign Minister as well as a low-interest loan to France in order to continue negotiations.¹² In March of 1798, President Adams "began drafting a message to Congress arguing that the 'accumulation of Injury [sic], outrage and Insult [sic]' inflicted upon the United States by France demanded 'an immediate Declaration of War.'"¹³ Yielding to Republican calls to release the details of the dispatches that warranted his fears, President Adams released the documents replacing the names of the French agents with X, Y, and Z.¹⁴ Backfiring on the Democrats, the

¹⁰ Geoffrey R. Stone, *Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism*, 1st ed. (New York: W.W. Norton & Co., 2004), 21.

¹¹ "The XYZ Affair and the Quasi-War with France, 1798-1800," US Department of State: Office of the Historian, www.history.state.gov/milestones/1784-1800/XYZ (accessed 18 May 2011). John Jay negotiated the treaty with the British; hence, it is the Jay Treaty.

¹² "The XYZ Affair and the Quasi-War with France, 1798-1800."

¹³ Stone, *Perilous Times*, 23.

¹⁴ "The XYZ Affair and the Quasi-War with France, 1798-1800."

details of the XYZ Affair provoked indignation and triggered “a wave of patriotic fervor” across the nation equal to a state of “undeclared war.”¹⁵ President Adams went so far as to recall George Washington from Mount Vernon and again place him in command of US military forces.¹⁶

The Othering

For the Federalists, who believed war with France much more likely than did the Republicans, the domestic threat from French loyalists was rooted in the “rapidly growing foreign-born population.”¹⁷ However, the government could not differentiate non-foreign born French loyalists from the rest of the population. As a result, this episode in US history demonstrates some degree of othering, but with limitations. Targeting foreign nationals could not completely address the threat. This would lead to both narrowly targeted and broadly applied responses.¹⁸

The Response

In 1798, the Federalist-controlled Congress enacted four separate laws collectively referred to as the Alien and Sedition Acts: the Naturalization Act (enacted 18 June 1798), the Alien Friends Act (enacted 25 June 1798), the Alien Enemies Act (enacted 6 July 1798), and the Sedition Act (enacted 14 July 1798).¹⁹

The two most restrictive of these acts were the Alien Friends Act and the Sedition Act. The Alien Friends Act authorized the President, in

¹⁵ Stone, *Perilous Times*, 23.

¹⁶ Stone, *Perilous Times*, 23.

¹⁷ Stone, *Perilous Times*, 30.

¹⁸ This study focuses on the domestic threat rather than the more serious external threat of the French navy.

¹⁹ The Naturalization Act is officially entitled “An Act to Establish a Uniform Rule of Naturalization.” The Alien Friends Act is officially entitled “An Act Concerning Aliens.” The Alien Enemies Act is officially entitled “An Act Representing Alien Enemies.” The Sedition Act is officially entitled “An Act for Punishment of Certain Crimes against the United States.” Information obtained from the Library of Congress, 25 January 2011, available at www.loc.gov/rr/program/bib/ourdocs/Alien.html. High resolution PDF copies of the original documents for The Alien Friends Act and The Sedition Act obtained from Our Documents, 25 January 2011, available at www.ourdocuments.gov/doc.php?doc=16&page=pdf#.

the words of the law, “to order all such aliens as he shall judge dangerous to the peace and safety of the United States, or shall have reasonable grounds to suspect are concerned in any treasonable or secret machinations against the government thereof, to depart out of the territory of the United States.”²⁰ Furthermore, those found suspect received “no right to due process, to counsel, or independent judicial review.”²¹ As a result of the act, “French immigrants fled the country, and the flow of immigrants into the United States trickled to a halt.”²² This demonstrates a response driven by the othering of a minority.

The Sedition Act made it illegal to “write, print, utter or publish, or ... knowingly and willingly assist or aid in writing, printing, uttering or publishing any false, scandalous and malicious writing or writings against the government of the United States.”²³ Thus, this piece of legislation did not target a minority, but applied to society as a whole. Together, these two acts impinged on the previously agreed upon civil liberties of due process and the right of free speech in criticizing the government.

The Aftermath

As 1798 wore on, the United States was able to avert a major war with France, though hostilities did break out on the high seas in what became the “Quasi War” with France. In the presidential election of 1800, Thomas Jefferson this time defeated John Adams and the Sedition Act expired as originally provided for in the law on the last day of Adams’s term in office.²⁴ One of Thomas Jefferson’s first acts as

²⁰ Information obtained from Our Documents, 25 January 2011, available at www.ourdocuments.gov/doc.php?doc=16&page=transcript.

²¹ Stone, *Perilous Times*, 33.

²² Stone, *Perilous Times*, 33.

²³ Information obtained from Our Documents, 25 January 2011, available at www.ourdocuments.gov/doc.php?doc=16&page=transcript.

²⁴ Stone, *Perilous Times*, 71.

President was to “pardon those who had been convicted under the Sedition Act and reimburse them for the fines they had paid.”²⁵

Geoffrey Stone called the Sedition Act of 1798 a “monster.”²⁶ In his eyes it was the “most grievous assault on free speech in the history of the United States.”²⁷ He is not alone in this opinion. In fact, a congressional committee in 1840 declared the Sedition Act a “‘mistaken exercise’ of power.”²⁸ Yet that Congress was passing judgment on a congress separated in context by 42 years. Future events would reveal this episode as one of the first examples of a pattern of dealing with external threats.

The Pattern

This event in American history followed a familiar pattern of behavior when balancing liberty and security. The threat came in the form of an impending war with France. The resultant wave of nationalism, exacerbated by the Federalists, narrowed the nation’s identity of the self through the lens of the threat—to the exclusion of foreign residents in this case. The resulting action limited the liberties of the “others,” by restricting the right to due process in the case of the Alien Friends Act. Although the threat from French loyalists existed in foreigners residing in America, it was impossible to eliminate the possibility of French sympathy and loyalty among American citizens as well. Thus, the Sedition Act addressed this problem by restricting civil liberties more broadly, curtailing the right to criticize the government.

After averting the threat, in this case the war with France, the government restored the previous balance between liberty and security and there was both a short and long-term sense of regret for actions taken.

²⁵ David P. Currie, *The Constitution in Congress: The Jeffersonians, 1801-1829* (Chicago: University of Chicago Press, 2001), 273.

²⁶ Stone, *Perilous Times*, 33.

²⁷ Stone, *Perilous Times*, 19.

²⁸ Stone, *Perilous Times*, 73.

President Lincoln's Suspension of Habeas Corpus

During the Civil War, President Lincoln made the hard decision to restrict civil liberties for the sake of defending the Union when he decided on eight occasions to suspend habeas corpus.²⁹ Habeas corpus, based on English common law, allows judges to validate the government's detainment of an individual.³⁰ The writ provides a means for the judicial branch to check and balance the executive branch.

The Constitution specifically addresses the ability to suspend habeas corpus in Article 1, Section 9, which states, "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." Yet the Constitution also very clearly grants this authority, by virtue of Article 1, Section 1, to Congress alone, and *not* the President. In short, this means that only the legislative branch, Congress, can suspend the judicial branch's means of oversight for the executive branch. "Without the writ of habeas corpus," Geoffrey Stone cautions, "a president could order an individual detained for any reason, or no reason at all, and no court could intervene."³¹ This is precisely what occurred during the Civil War.

The Threat

It is difficult to discuss the threat facing Lincoln in 1861 without first discussing the conditions surrounding the 1860 election. Lincoln was a "sectionally chosen president," receiving not one "electoral vote south of the Ohio River."³² Republicans were not even on the ballot in ten southern states and the five slave states that did have Lincoln on the

²⁹ Geoffrey R. Stone, *War and Liberty: An American Dilemma: 1790 to the Present* (New York: W.W. Norton, 2007), 24.

³⁰ William H. Rehnquist, *All the Laws but One: Civil Liberties in Wartime*, 1st ed. (New York: Knopf, 1998), 23.

³¹ Stone, *War and Liberty*, 24.

³² Rehnquist, *All the Laws but One*, 4.

ballot garnered him only 4 percent of the popular vote.³³ In essence, most states made the decision to secede from the Union when Lincoln won the election.

In December of 1860, South Carolina became the first state to secede from the Union. Before Lincoln had boarded the train to travel to Washington, D.C. to assume the presidency, Georgia, Florida, Alabama, Mississippi, and Louisiana had joined South Carolina to establish the Confederate States of America.³⁴ When Confederate forces attacked Fort Sumter on 12 April 1861, Maryland fell in the realm of “precarious loyalty,” a slave state that remained in the Union.³⁵ Lincoln had won only about 2,200 votes of the 90,000 votes in that state.³⁶ The large number of secessionist sympathizers, particularly in Baltimore, made transit by Union soldiers difficult between the North and Washington, D.C.³⁷ On 19 April 1861, a mob of 20,000 surrounded Union soldiers marching across Baltimore to board a connecting train. Fearful of the growing threat, some soldiers fired upon the crowd which then attacked the troops. When they finally boarded their train bound for Washington, 16 individuals were dead, four of them Union soldiers and 12 of them Baltimoreans.³⁸ The mayor of Baltimore, at the urging of the chief of the Baltimore police, destroyed all railroad bridges leading north from Baltimore to prevent additional Union soldiers reaching Washington, making the Union capital “isolated and gripped by fear.”³⁹ Without a doubt, early hostilities in the Civil War, particularly the actions within

³³ James McPherson, *Battle Cry of Freedom: The Civil War Era* (New York: Oxford University Press, 2003), 223.

³⁴ Rehnquist, *All the Laws but One*, 4; Texas, Virginia, North Carolina, Tennessee, and Arkansas later joined the Confederacy.

³⁵ Stone, *War and Liberty*, 24.

³⁶ Rehnquist, *All the Laws but One*, 7.

³⁷ David Greenberg, “Lincoln’s Crackdown.” *The Slate*, www.slate.com/id/2059132/ (accessed 25 January 2011).

³⁸ McPherson, *Battle Cry of Freedom*, 285; Rehnquist, *All the Laws but One*, 20-21.

³⁹ Stone, *War and Liberty*, 25; Rehnquist, *All the Laws but One*, 21.

Baltimore, signaled a full-fledged crisis. Supporters demanded Lincoln do something to protect the integrity of the Union.

The Othering

In this case, from the perspective of the Union, the threat was secessionist sympathizers.⁴⁰ However, similar to the problem with French loyalists, there was no way to associate this threat with a readily identifiable minority. They were recognizable only after interfering with Union activities. The inability to “other” secessionist sympathizers led to more broadly applied restrictions of civil liberties. In this case, it forced Lincoln to suspend the habeas corpus.

The Response

On 27 April 1861, after consulting with Attorney General Edward Bates of Missouri, Lincoln “issued an executive order suspending the writ of habeas corpus in those areas along the route between Philadelphia and Washington in which secessionists might block military access to Washington.”⁴¹ This gave Union generals the ability to “arrest and detain without trial anyone in the area who threatened ‘public safety.’”⁴² To Lincoln’s benefit, Congress was not in session at the time of the crisis.⁴³

Chief Justice Roger Taney quickly ruled that Lincoln’s suspension of habeas corpus was unconstitutional. He noted that only Congress could suspend habeas corpus. Taney, a Maryland slave-owner who wrote the majority opinion in the 1857 Dred Scott decision, declared “the president has exercised a power which he does not possess under the constitution.”⁴⁴ However, Lincoln flatly refused to obey Taney’s ruling.⁴⁵

⁴⁰ The Confederate Congress also suspended the writ of habeas corpus at specific times and places in order to detain Union sympathizers.

⁴¹ Stone, *War and Liberty*, 25; Greenberg, “Lincoln’s Crackdown.”

⁴² Greenberg, “Lincoln’s Crackdown.”

⁴³ McPherson, *Battle Cry of Freedom*, 288.

⁴⁴ Stone, *War and Liberty*, 26.

⁴⁵ McPherson, *Battle Cry of Freedom*, 288.

In 1863 Lincoln expanded the suspension of habeas corpus in response to violence in the North spurred by anti-draft riots and protests against the Emancipation Proclamation.⁴⁶ This time, Lincoln suspended habeas corpus to “all persons ... guilty of any disloyal practice” and delegated enforcing authority to Secretary of State William Seward.⁴⁷

The Aftermath

All told, Union authorities arrested somewhere between 13,000 and 38,000 civilians as a result of Lincoln’s decision to suspend the writ of habeas corpus.⁴⁸ Some of the arrests during this time embarrassed Lincoln. For example, General Ambrose Burnside arrested Clement Vallandigham, a national leader of the Copperheads, a faction of northern “Peace Democrats” who opposed the war.⁴⁹ The incident created a field-day in newspapers across the United States for Lincoln’s political opponents, who accused the president of reintroducing the Sedition Act of 1798, “but without the authority of an act of Congress to support him.”⁵⁰

Yet in one regard Lincoln was a visionary. The argument by Chief Justice Taney against Lincoln’s suspension of the writ of habeas corpus appropriately focused on the delineation between presidential and congressional powers in the Constitution. The court’s authority fell short of addressing whether the president *should* have the power to suspend the writ of habeas corpus during times of crisis. In March of 1963 Congress enacted the Habeas Corpus Act, “effectively endorsing Lincoln’s actions.”⁵¹

Lincoln explained his actions in a special session to Congress on 4 July 1861, asking, “Must a government, of necessity, be too *strong* for

⁴⁶ Stone, *War and Liberty*, 29.

⁴⁷ Stone, *War and Liberty*, 29.

⁴⁸ Stone, *War and Liberty*, 31.

⁴⁹ McPherson, *Battle Cry of Freedom*, 591, 596.

⁵⁰ Stone, *War and Liberty*, 33.

⁵¹ Greenberg, “Lincoln’s Crackdown.”

the liberties of its own people, or too *weak* to maintain its own existence (emphasis in original)?”⁵² Addressing his suspension of habeas corpus, asking, “Are all the laws, *but one*, to go unexecuted, and the government itself go to pieces, less that one be violated (emphasis in original)? Even in such a case, would not the official oath be broken, if the government should be overthrown, when it was believed that disregarding the single law, would tend to preserve it?”⁵³ Although Lincoln claimed in the same speech that no law had been broken, he clearly laid out the very nature of balancing security and liberty, were it to require breaking the law. This is an effective example of how the Constitution is a flexible, adaptive document. As one author puts it, “If we do not allow the Constitution to bend, it may break.”⁵⁴

The Pattern

In this short episode, the familiar pattern of dealing with an internal threat to national security is visible. First, a threat arises from the secession of southern states that quickly turns into a crisis when Union troops have difficulty transiting Baltimore. Next, an inability to “other” secessionist sympathizers through a visible minority led to more widespread restriction of civil liberties; in this case, suspending the writ of habeas corpus. After averting the threat, Lincoln restored habeas corpus.

Japanese Internment during World War II

Americans worried that the attack on Pearl Harbor could be the prelude to a surprise attack on the West Coast. Overnight, the country perceived a formidable threat to national security in the thousands of Japanese-Americans living in the Pacific region of the United States.

⁵² Abraham Lincoln and Thomas Harry Williams, *Abraham Lincoln: Selected Speeches, Messages, and Letters* (New York,: Rinehart, 1957), 155.

⁵³ Lincoln and Williams, *Abraham Lincoln*, 156.

⁵⁴ Posner, *Not a Suicide Pact*, x.

The Threat

Eleven days after the attack in Pearl Harbor, the president directed a commission to investigate the attack. Although the report's findings focused on the "dereliction there had been in the American chain of command that allowed the Japanese to take the Americans completely by surprise," it also "found that there had been espionage in Hawaii."⁵⁵ As the Commission's report stated, "It was believed that the center of Japanese espionage in Hawaii was the Japanese consulate at Honolulu. It has been discovered that the Japanese consul sent to and received from Tokyo in his own and other names many messages on commercial radio circuits."⁵⁶

These findings led the top government officials to fear Japanese raids along the West Coast. Secretary of War Henry L. Stimson noted that, "Japanese raids on the West Coast seemed not only possible but probable in the first months of the war, and it was quite impossible to be sure that the raiders would not receive important help from individuals of Japanese origin."⁵⁷ The public, too, believed that "there were Japanese saboteurs active along the Pacific Coast."⁵⁸

In addition, the military possessed some physical military intelligence, via coded messages sent between Japanese consulates and Tokyo, broken by the US Navy. These decoded messages, under the codename "MAGIC," revealed that "first and second generation Japanese had been successfully recruited and were now spying."⁵⁹

Pearl Harbor created a distinct crisis that required action of some sort to ease public tensions. Historian Geoffrey Smith wrote that the

⁵⁵ Rehnquist, *All the Laws but One*, 189.

⁵⁶ Rehnquist, *All the Laws but One*, 189.

⁵⁷ Rehnquist, *All the Laws but One*, 190.

⁵⁸ Donald Teruo Hata and Nadine Ishitani Hata, *Japanese Americans and World War II: Mass Removal, Imprisonment, and Redress*, 3rd ed. (Wheeling, Ill.: Harlan Davidson, 2006), 10.

⁵⁹ William Dudley, *Japanese American Internment Camps*, *At Issue in History* (San Diego, Calif.: Greenhaven Press, 2002), 65.

“event produced a mix of disbelief, outrage, and anxiety in the United States, emotions that grew in the ensuing weeks as Japan dealt Allied forces in the Western Pacific an unexpected series of military reversals. ... In the shadow of Pearl Harbor the fear of an actual invasion by Japan became acute.”⁶⁰ Even Chief Justice Frank Murphy, dissenting in a wartime case that upheld the internment, recognized “the military and naval situation in the spring of 1942 was such as to generate a very real fear of invasion of the Pacific Coast, accompanied by fears of sabotage and espionage in that area.”⁶¹ In the words of Earl Warren, testifying to Congress shortly after Roosevelt’s signing of Executive Order 9066, “Something should be done and done immediately.”⁶²

The Othering

After the attack by the Japanese in Hawaii, it was easy to see the Japanese as potential enemies, regardless of citizenship. In this case, othering occurred along racial lines in the response to the attack on Pearl Harbor. Years of racial tensions did not help. Additionally, the Japanese had themselves failed to assimilate within American culture. Their isolated and tight-knit community made it “virtually impenetrable to efforts of the American government to sort out those whose loyalties were with Japan.”⁶³ All of these factors combined to generate a class of “others” known by a simple racial slur, “Jap.”

In reality, there were two distinct generations of Japanese Americans. The Issei were first generation immigrants from Japan, who numbered roughly 40,000. The Nisei were American-born children of the Issei, and thus American citizens, totaling roughly 70,000.⁶⁴ In the eyes

⁶⁰ Dudley, *Japanese American Internment Camps*, 46.

⁶¹ Dudley, *Japanese American Internment Camps*, 78.

⁶² Dudley, *Japanese American Internment Camps*, 24.

⁶³ Dudley, *Japanese American Internment Camps*, 66.

⁶⁴ Hata and Hata, *Japanese Americans and World War II*, 3.

of those making security decisions, there would be no delineation. As the saying went, “A Jap’s a Jap.”

Lt Gen John DeWitt, Commander of Western Defense Command and the one who proposed internment, provided fantastic insight into how deeply rooted this othering against the Japanese, even against those born in America, had become in his final recommendation to Secretary of War Stimson. “The Japanese race is an enemy race,” DeWitt proclaimed, “and while many second and third generation born on United States soil, possessed of United States citizenship, have become ‘Americanized,’ the racial strains are undiluted.”⁶⁵ It is not surprising that this fervent racial othering led to absurd conclusions. For example, General DeWitt observed, “The very fact that no sabotage has taken place to date is a disturbing and confirming indication that such action will be taken.”⁶⁶ The paranoia of this logic is staggering. However, there is no requirement for fears to be rational. The presence of a threat that generates an environment of fear often leads to an abundance of caution.

Organizational bureaucracy also fueled the fire. With the subsequent firing of two generals for “failure to anticipate the Japanese surprise attack,” overreaction was expected.⁶⁷ Nobody wanted to be the one responsible for a second Pearl Harbor on the West Coast, especially at San Diego or San Francisco. The ability and choice to exclude the Japanese from the collective American identity enabled more targeted, though also more severe, retrenchment of civil liberties.

The Response

On 19 February 1942, President Roosevelt signed Executive Order No. 9066. Ironically, the order designed to relocate Japanese-Americans does not mention any specific race. The essential part of the presidential order reads,

⁶⁵ Dudley, *Japanese American Internment Camps*, 36.

⁶⁶ Dudley, *Japanese American Internment Camps*, 37.

⁶⁷ Dudley, *Japanese American Internment Camps*, 98.

I hereby authorize and direct the Secretary of War, and the Military Commanders ... to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion.⁶⁸

Secretary of War Henry Stimson placed General DeWitt in charge of the evacuation.⁶⁹ Public Proclamation No. 1, signed by General DeWitt, ordered “any Japanese, German, or Italian alien, *or any person of Japanese Ancestry*” (emphasis added) as those persons subject to restrictions.”⁷⁰ By summer, 110,000 Japanese Americans, including men, women, and children, would find themselves in American internment camps, called concentration camps by some.⁷¹

The Aftermath

Although the military classified all persons of Japanese ancestry as threats to national defense, the Department of Justice detained roughly 3,000 Japanese aliens considered dangerous within days of Pearl Harbor.⁷² This rapidly implemented and intelligence-based measure designed to remove those truly considered a concern had no effect on the relocation of Japanese Americans.

The war would see no Japanese invasions or raids along the West Coast. In fact, “no Japanese surface ship ever operated in the eastern part of the Pacific between Hawaii and the mainland.”⁷³ Moreover, a

⁶⁸ "Executive Order 9066," WikiSource, http://en.wikisource.org/wiki/Executive_Order_9066,

⁶⁹ Hata and Hata, *Japanese Americans and World War II*, 12.

⁷⁰ "Public Proclamation No. 1," WikiSource, http://en.wikisource.org/wiki/Public_Proclamation_No._1 (accessed 28 January 2011); Dudley, *Japanese American Internment Camps*, 41.

⁷¹ Hata and Hata, *Japanese Americans and World War II*, 3.

⁷² Dudley, *Japanese American Internment Camps*, 58.

⁷³ Dudley, *Japanese American Internment Camps*, 89.

1982 commission report found that, “not a single documented act of espionage, sabotage, or fifth column activity was committed by an American citizen of Japanese ancestry or by a resident Japanese alien on the West Coast.”⁷⁴ However, this observation does not acknowledge the fact that relocation may have been the casual factor for such a finding.

Chief Justice Frank Murphy, in his dissenting view from *Korematsu v. United States*, which upheld the relocation of Japanese Americans, argued the Supreme Court’s decision was “legalization of racism.”⁷⁵ In his view, there was “no adequate reason ... given for the failure to treat these Japanese Americans on an individual basis.”⁷⁶ In his opinion, the episode was “one of the most ‘sweeping and complete deprivations of constitutional rights in the history of this nation.’”⁷⁷

Jacobus tenBroek, professor of political science at the University of California at Berkeley, argued that the government’s actions posed a threat to civil liberties for all Americans by violating “the basic individualism which sustains a democracy” and “looms as a great and evil blotch upon our national history.”⁷⁸ Eugene Rostow, professor at Yale Law School, labeled the program a “disaster.”⁷⁹

The US government would eventually agree with these minority voices at the time. A lawyer for the American Civil Liberties Union would label the incident as “the worst blow to civil liberty in our history.”⁸⁰ Over 110,000 Japanese-Americans, nearly two-thirds of who were born in the United States and thus American citizens, spent the war in internment camps and lost their homes, businesses, and other property. On 10 August 1988, Ronald Reagan signed the Civil Liberties Act of

⁷⁴ Dudley, *Japanese American Internment Camps*, 64.

⁷⁵ Dudley, *Japanese American Internment Camps*, 81.

⁷⁶ Dudley, *Japanese American Internment Camps*, 80.

⁷⁷ Dudley, *Japanese American Internment Camps*, 88.

⁷⁸ Dudley, *Japanese American Internment Camps*, 87-88.

⁷⁹ Dudley, *Japanese American Internment Camps*, 97.

⁸⁰ Dudley, *Japanese American Internment Camps*, 97.

1988, officially acknowledging, apologizing, and making restitutions for the “grave injustice ... done to both citizens and resident aliens of Japanese ancestry by the evacuation, relocation, and internment.”⁸¹ The government issued the first rounds of checks in 1990, along with an apology signed by President George H. W. Bush.⁸²

The Pattern

This episode also matches the pattern discussed previously and is the clearest example of how othering can simultaneously narrow and intensify the loss of civil liberties for the sake of security. Although the actions targeted only a small fraction of the American population, internment was an immense price to pay for tens upon tens of thousands of innocent people.

First, the attack upon Pearl Harbor signaled a clear threat through a distinct crisis, killing over 2,000 Americans and injuring nearly 2,000 more. The threat triggered othering that focused squarely on the Japanese. Additionally, it played upon racial tensions that had grown since cutting off Japanese immigration in 1924 and the unassimilated character of Japanese communities. This othering led to restriction of civil liberties against those of Japanese ancestry, despite the fact that nearly two-thirds were American-born citizens. After the war, with crisis averted, Japanese Americans regained their civil liberties. The feelings of remorse and regret led to eventual redress for survivors and an official apology.

Conclusion

The United States treats domestic civil liberties in a fairly traditional manner when faced with a threat that calls into question national security. Simply identifying the threat by category, in these cases French loyalists, secessionist sympathizers, or Japanese

⁸¹ *Civil Liberties Act of 1988*, Public Law 100-383, 100th Congress (accessed 10 August 1988).

⁸² Hata and Hata, *Japanese Americans and World War II*, 3.

Americans, triggers the attractive and convenient practice of othering. This enables viewing the threat beyond the identity of the self, creating an ability to restrict domestic civil liberties in demand for some sort of a response, but with precision against those viewed as “others.” For the quasi-war with France, othering was partially successful, targeting foreign aliens, but without the ability to target French loyalists completely. Thus, the Alien and Sedition Acts contained both elements of a targeted response against foreign aliens and a broad response against free speech. In the Civil War, an inability to “other” secessionist supporters required a broad restriction to civil liberties through Lincoln’s suspension of the writ of habeas corpus. After Pearl Harbor, the opportunity and desire to “other” those of Japanese descent enabled more narrowly applied and more intensive restrictions to civil liberties through President Roosevelt’s authorization to intern 110,000 Japanese Americans. In all three cases, the threat eventually dissolved; the United States avoided war with France; the North won the Civil War; the Allies won World War II. Thus, with security assured, the government restored domestic civil liberties and regret, remorse, and redress take their course.

Chapter 2

The Second Red Scare

Anti-communist sentiment following World War II was nothing new for the United States. As World War I came to a close, the First Red Scare swept the nation, fueled by wartime nationalism, xenophobia, massive immigration, and labor strife that included several massive and bloody strikes.¹ On the heels of the Bolshevik Revolution and communist rise to power in the Soviet Union, President Woodrow Wilson feared efforts “made by communist agents to promote revolution in Western Europe and the United States.”² However, widespread concern subsided after May Day celebrations in 1920, when massive riots failed to materialize as predicted.³ Latent concern for communist expansion never fully disappeared, however, though gnawing apprehension toward communism yielded to growing alarm over fascism in the 1930s.

Although relative peace existed after World War II “for the first time in over a decade,” the international system grappled with a new political context of bipolarity.⁴ Boosted by the successes in World War II, the world’s two superpowers appeared destined for a military showdown. This new political context thrust previous concerns for communism and communist expansion back to the forefront. Although there was no initiating event such as Pearl Harbor to ignite alarm, the internal threat of communism grew through a myriad of external and internal factors and incidents.

¹ "First Red Scare," Ohio History Central, www.ohiohistorycentral.org/entry.php?rec=496 (accessed 15 March 2011).

² "The Red Scare," U-S-History.com, www.u-s-history.com/pages/h1343.html (accessed 15 March 2011).

³ "The Red Scare."

⁴ Geoffrey R. Stone, *War and Liberty: An American Dilemma: 1790 to the Present* (New York: W.W. Norton, 2007), 85.

The external threat of communism in the form of global expansion, hawkish rhetoric, and atomic weapons fueled the perception of an internal threat of communism from American communist subversives. In turn, politicians leveraged this growing fear for their own advantage, thereby ratcheting up the demand by the American people for action. This surge of anti-communist sentiment resulted in restrictions on domestic civil liberties, especially freedom of speech, in an effort by politicians to respond to calls, partially due to their own actions, for securing America against the Great Red Menace within.

Communism and Civil Liberties

The Threat

The peace following World War II would be short-lived as the previously multi-polar world awoke to a new bi-polar reality and “the United States slipped almost seamlessly into the Cold War.”⁵ The only way to understand the fear of communist subversion begins with an appreciation of how that external threat in addition to domestic factors combined to produce the internal threat of communist subversion.

The External Threat. After World War II, the alliance between the United States and the Soviet Union fractured. Hawkish rhetoric by Stalin made conflict appear imminent. In a public speech in February 1946, for example, he “implied that future wars were inevitable until Communism replaced capitalism.”⁶ Over the next few years, Stalin started backing his rhetoric with action, both direct and indirect. In 1947, communism expansion threatened Greece and Turkey. In 1948, the Soviets blockaded Berlin and communists gained control of

⁵ Geoffrey R. Stone, *Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism*, 1st ed. (New York: W.W. Norton & Co., 2004), 312.

⁶ "History, Federal Bureau of Investigations," Federation of American Scientists, www.fas.org/irp/agency/doj/fbi/fbi_hist.htm (accessed 17 February 2011).

Czechoslovakia.⁷ In 1949, Mao Zedong led communists to victory in China: "Overnight, almost a quarter of the world's population was 'lost' to the Reds. America was stunned and frightened."⁸ Even before the Korean War, the threat of communism appeared closer and closer to the American homeland. The threat escalated significantly when America lost its atomic monopoly in 1949.

Nuclear Weapons. In 1949, the Soviets detonated their first atomic weapon. Overnight, the dynamics of the threat changed. The doomsday clock, symbolizing "how close humanity is to catastrophic destruction" first appeared on the cover of *The Bulletin of Atomic Scientists* in 1947.⁹ It indicated seven minutes until midnight, a relative measure for the "urgency of the nuclear dangers."¹⁰ In 1949, the clock moved ahead to three minutes to midnight, indicating a greater likelihood of nuclear war and destruction of the world with it.¹¹ In 1953, after the United States and the Soviet Union both successfully tested a hydrogen bomb, the clock moved again. This time it showed two minutes until midnight, the closest to midnight the clock would ever reach, and it stayed there until 1960.¹² Americans believed the threat of total nuclear war was legitimate, perhaps even inevitable.

Assessing Soviet Will. In a National Opinion Research Center poll in May 1946, 75 percent of respondents believed Soviets would use atomic bombs against American cities in a war.¹³ Furthermore, another

⁷ Mike Manor, "The Home Front: Civil Rights, American Values, and Public Trust When America Is at War," (School of Advanced Air and Space Studies, Air University, 2008), 29.

⁸ Stone, *War and Liberty*, 90.

⁹ "Doomsday Clock Overview," *The Bulletin of Atomic Scientists*, www.thebulletin.org/content/doomsday-clock/overview (accessed 16 February 2011).

¹⁰ "Doomsday Clock Timeline," *Bulletin of the Atomic Scientists*, www.thebulletin.org/content/doomsday-clock/timeline (accessed 16 February 2011).

¹¹ "Doomsday Clock Timeline."

¹² "Doomsday Clock Timeline."

¹³ "The Quarter's Polls, Vol. 10, No. 2 (Summer, 1946)," *The Public Opinion Quarterly*: 247.

poll showed 52 percent believed the Soviet Union's intentions were "unfavorable," most of which believed the Soviets were pursuing global supremacy.¹⁴

An August 1946 American Institute of Public Opinion poll indicated that only 23 percent of respondents believed American citizens who were members of the Communist Party were loyal to the United States.¹⁵ Furthermore, only 17 percent thought US communists should be able to hold civil service jobs.¹⁶ One poll question in particular indicated the trend against the Russians. When asked in an October 1946 poll, "Do you feel more friendly, or less friendly, towards Russia than a year ago?" 51 percent of those polled indicated "less friendly."¹⁷ Attitudes towards nuclear war and Communism had definitely deteriorated. By July of 1947, nearly half of all Americans expected war within the next 10 years.¹⁸

The Soviets produced a nuclear weapon much sooner than expected.¹⁹ The only explanation lay in espionage by Soviet spies and communist sympathizers in the United States. A series of high-profile espionage cases explained how this was possible, feeding the growing belief that the real threat was within American borders.

Klaus Fuchs. Regarded by many as "the most important atomic spy in history," Fuchs was the German-born lead physicist for the Manhattan Project.²⁰ Authorities learned of Fuchs' espionage via VENONA, a decoding project similar to ULTRA used to decipher cables to

¹⁴ "The Quarter's Polls, Vol. 10, No. 2 (Summer, 1946)," 264.

¹⁵ "The Quarter's Polls, Vol 10, No. 4 (Winter 1946-1947)," *The Public Opinion Quarterly*: 608.

¹⁶ "The Quarter's Polls, Vol 10, No. 4 (Winter 1946-1947)," 608.

¹⁷ "The Quarter's Polls, Vol 10, No. 4 (Winter 1946-1947)," 640.

¹⁸ "The Quarter's Polls, Vol 11, No. 3 (Autumn 1947)," *The Public Opinion Quarterly*: 489.

¹⁹ Marian Smith Holmes, "Spies Who Spilled Atomic Bomb Secrets," *The Smithsonian*, www.smithsonianmag.com/history-archaeology/Spies-Who-Spilled-Atomic-Bomb-Secrets.html (accessed 17 February 2011).

²⁰ Holmes, "Spies Who Spilled Atomic Bomb Secrets."

Moscow.²¹ According to Marian Smith Holmes, "Just weeks after the Soviets exploded their atomic bomb in August 1949, a VENONA decryption of a 1944 message revealed that information describing important scientific processes related to construction of the A-bomb had been sent from the United States to Moscow. FBI agents identified Klaus Fuchs as the author."²² After arrest, Fuchs confessed all, implicating several other spies, most Americans, including David Gold, a 39-year-old chemist from Philadelphia who passed secrets, David Greenglass, a machinist at Los Alamos, and Greenglass' sister and her husband, Ethel and Julius Rosenberg.²³

Ethel and Julius Rosenberg. The trial and execution of Ethel and Julius Rosenberg helped support those already advocating the internal threat of communism. The Rosenbergs appeared before a grand jury in 1950, to testify against charges of espionage, accused of passing atomic secrets to the Soviet Union during World War II.²⁴ The couple, though pleading their innocence throughout, lost the trial. The government executed them at Sing-Sing Prison in 1953.²⁵

Ethel and Julius Rosenberg were American Communists, though Mrs. Rosenberg pleaded the 5th amendment when asked over a dozen questions regarding if she or her husband had any affiliation to the Communist party.²⁶ Yet the Rosenbergs, Ethel in particular, looked no different than anyone else, fostering the idea that the next-door neighbor

²¹ Holmes, "Spies Who Spilled Atomic Bomb Secrets."

²² Holmes, "Spies Who Spilled Atomic Bomb Secrets."

²³ Holmes, "Spies Who Spilled Atomic Bomb Secrets."

²⁴ "50 Years Later, Rosenberg Execution Is Still Fresh," USA Today, www.usatoday.com/news/nation/2003-06-17-rosenbergs_x.htm (accessed 16 February 2011).

²⁵ "50 Years Later, Rosenberg Execution Is Still Fresh."

²⁶ "Testimony of Ethel Rosenberg, 08/07/1950," The National Archives, <http://media.nara.gov/northeast/nyc/rosenbergcasefiles-rosenberg-ethel-pg9208to9213.pdf>; "Testimony of Ethel Rosenberg, 08/11/1950," The National Archives, <http://media.nara.gov/northeast/nyc/rosenbergcasefiles-rosenberg-ethel-pg9252to9261.pdf> (accessed 16 February 2011). The US government has not yet publicly released the transcripts of Julius Rosenberg's testimony before the grand jury.

could be selling secrets to the Soviets. Unlike the fear of Japanese following Pearl Harbor, you simply could not tell a communist by looking at them. This would be a factor that quick-thinking politicians would play in their favor.

The Internal Threat. Communist expansion, hawkish rhetoric, and a growing Soviet atomic arsenal created a credible external threat. Espionage created a rational link between an external and internal threat. Partisan politics, however, leveraged rational fears to exaggerate this internal threat. In both cases, the American Communist Party seemed an obvious link between a visible external communist movement and hidden internal communist subversives.

American Communists. Support for communism in America during the 1940's stems from the Great Depression of the 1930's. According to Stone, "With a third of all Americans unemployed, the Depression triggered a severe loss of confidence in America's business and political leaders, a widespread demand for economic and social reform, and a desperate search for answers."²⁷ The alliance with the Soviet Union during World War II and President Roosevelt's declaration that "we are going to get along very well with ... the Russian people—very well indeed" helped boost the image and acceptance of communism for a brief period, when, according to Stone, "Americans were more open than ever to learning about Communism.... Hundreds of clubs, associations, committees, and alliances sprang into being to fight for economic, social, political, racial, and international justice."²⁸ Yet, as a political party the American Communist Party never threatened the established political parties for power. Voters never elected an American communist to

²⁷ Stone, *War and Liberty*, 87.

²⁸ Stone, *War and Liberty*, 88.

Congress and no communist presidential candidate received more than 10 percent of the popular vote.²⁹

As the external threat of communism grew, the domestic tolerance for communist support dwindled. Those who were affiliated with or supported the American Communist Party would regret their earlier decision when later faced with the question, *Are you now or have you ever been a communist?* Politicians would help bridge the gap between external and internal fears of communism by making it an election issue, particularly in 1946.

Election Politics. Facing mid-term elections in 1946, the Republicans ran on an anti-communism platform. Richard Nixon blasted his opponent for voting “the ‘Moscow’ line”; a little known candidate for senate, Joseph R. McCarthy, painted his competition of communist inclinations; and Hugh Butler, a Republican Senator from Nebraska, decreed that “if the New Deal is still in control of Congress after the election, it will owe that control to the Communist party.”³⁰ The chairman of the Republican National Committee, B. Carroll Reece, summarized it quite simply, saying, “The choice which confronts Americans is between Communism and Republicanism.”³¹ The strategy served the Republican Party well. In all, Republicans gained control of both chambers, picking up 54 seats in the House and 11 seats in the Senate.³² Regardless of the credibility of the threat, the election results injected a clear message into the political process – *the federal government needed to do something about communism*. In 1950, Senator McCarthy began doing something extreme to ratchet up internal fears of communist subversion.

²⁹ Stone, *War and Liberty*, 87.

³⁰ Stone, *Perilous Times*, 312.

³¹ Lisle Abbott Rose, *The Cold War Comes to Main Street: America in 1950* (Lawrence: University Press of Kansas, 1999), 49.

³² Stone, *War and Liberty*, 86.

McCarthy's Speech (1950). On 9 February 1950, Senator McCarthy delivered a Lincoln Day speech at a dinner in Wheeling, West Virginia.³³ In the speech, he boldly asserted, "I have here in my hand a list of 205—a list of names that were made known to the secretary of state as being members of the Communist Party and who nevertheless are still working on and shaping policy in the State Department."³⁴ Although this claim was totally false, the very accusation fostered fears of American communist subversion.³⁵ Even though the Tydings Committee's report in July of 1950 indicated that McCarthy's statements were "perhaps the most nefarious campaign of half-truths and untruth in the history of the Republic," the initial volleys of the Korean War a month earlier garnered all the headlines and further exacerbated the fear culled by Senator McCarthy.³⁶

As Senator McCarthy toured the nation in a series of speaking engagements, he "charged that there was a 'plot' at the highest levels of government 'to reduce security ... to a nullity.'"³⁷ Whether the charges were true or not, his "certitude and patriotism" swept away audiences.³⁸

Character of the Threat. Communism was an existential threat by the very nature of its ideology for many. J. Edgar Hoover, Director of the FBI, was among them and with the ear of the President. The FBI Director urged the President to take action, joining "the external challenge of communism with what he considered to be an acute internal threat."³⁹ He warned the President that, "Communists were infiltrating

³³ Stone, *War and Liberty*, 91.

³⁴ Stone, *War and Liberty*, 91-92. There is some debate as to how many names Senator McCarthy actually claimed to possess during his speech. Some sources indicated 57 names instead of 205. McCarthy claimed the number was 81 only days afterwards.

³⁵ Stone, *War and Liberty*, 92.

³⁶ Stone, *War and Liberty*, 92.

³⁷ Stone, *War and Liberty*, 93.

³⁸ Stone, *War and Liberty*, 93.

³⁹ Peter L. Steinberg, *The Great "Red Menace": United States Prosecution of American Communists, 1947-1952*, Contributions in American History (Westport, Conn.: Greenwood Press, 1984), x.

every aspect of life in the United States.”⁴⁰ If given the chance, it was certain that American subversives would surely overthrow the government, destroying the liberal democracy, not by external means, but from growth within.

The Othering

During this period, America redefined itself as staunchly anti-communist. Consequently, othering fell squarely on the shoulders of American communists, past and present, in order to target communist subversives. Communism posed both a direct threat by physical attack, and also an indirect threat to American values. As Geoffrey Stone noted, “If [communism] infected the nation, it would endanger religious beliefs.... It would poison national values and destroy the will to resist.... It would lead to a loss of liberty, justice, and spiritual goodness.

Communism was cancerous.”⁴¹ The only way to kill the cancer was to kill the infected cells—individuals of known or suspected communist loyalties. As FBI Director J. Edgar Hoover noted, “[Communist] doctrines threaten the happiness of the community, the safety of every individual, and the continuance of home and fireside. They would destroy the peace of the country and thrust it into a condition of anarchy and lawlessness and immorality that passes imagination.”⁴² Hoover went so far as to call communism the “mortal foe of Christianity. Either it will survive or Christianity will triumph because in this land of ours the two cannot live side by side.”⁴³ By othering American communists, the majority isolated a minority against which it could take action to enhance the perception of security.

⁴⁰ Steinberg, *The Great "Red Menace,"* x.

⁴¹ Stone, *Perilous Times*, 314.

⁴² Steinberg, *The Great "Red Menace,"* 10.

⁴³ Steinberg, *The Great "Red Menace,"* xi.

The Response

The response to growing fears of communism and the threat it posed to American security occurred across all branches of the federal government. Congress replied with numerous acts and hearings. The various presidential administrations issued multiple executive orders. Even the Supreme Court demonstrated a willingness to bend to political wind. This section examines the response by all three branches.

Congressional Acts. A typical congressional response to threat, as shown in Chapter 1, is passage of alien registration and sedition acts. World War II and the Cold War proved to be no exception. Since the threat of communism grew slowly, some of the responses by Congress pre-date the fevered pitch of the Second Red Scare.

Several laws formed the legislative framework for dealing with the internal threat of communism. The first law, known as the Foreign Agents Registration Act of 1938, was “to require the registration of certain persons employed by agencies to disseminate propaganda in the United States.”⁴⁴ In the next year, Congress passed the Hatch Act of 1939,⁴⁵ which “denied federal employment to any person who was a member of a political party or organization ‘which advocates the overthrow of our constitutional form of government.’”⁴⁶

The third and best known of these laws was the Alien Registration Act of 1940. More commonly known as the Smith Act,⁴⁷ the law prohibited “certain subversive activities; to amend certain provisions of law with respect to the admission and deportation of aliens; to require the fingerprinting and registration of aliens.”⁴⁸ The Smith Act “required

⁴⁴ 52 Stat. 631 (1938).

⁴⁵ 53 Stat. 1147 (1939).

⁴⁶ Steinberg, *The Great "Red Menace,"* 23.

⁴⁷ "The Smith Act of 1940," Boston College, www.bc.edu/bc_org/avp/cas/comm/free_speech/smithactof1940.html (accessed 14 March 2011).

⁴⁸ 54 Stat. 670 (1940).

all resident aliens to register with the Immigration and Naturalization Service.”⁴⁹

In addition to alien registration mandates, the Smith Act contained several sections on sedition. These sections made it illegal “to interfere with, impair, or influence the loyalty, morale, or discipline of the military or naval forces of the United States ... to knowingly or willfully advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence ... to print, publish, edit, issue, circulate, sell, distribute, or publicly display any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing any government in the United States by force or violence.”⁵⁰ However, the restriction designed to weaken the American Communist Party was that it was unlawful “to organize or help to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any government in the United States by force or violence; or to be or become a member of, or affiliate with, any such society, group, or assembly of persons, knowing the purposes thereof.”⁵¹ By simply assuming that the American Communist Party desired to overthrow the US government by force, the government could charge any member of the party or its associates with a crime, then fine them up to \$10,000 and imprison them for up to 10 years.⁵² In short, political dissent equated to disloyalty. Federal attorneys prosecuted over a hundred individuals under the Smith Act due to their involvement with the American Communist Party.⁵³

⁴⁹ Stone, *War and Liberty*, 64-65.

⁵⁰ Morton H. Halperin and Daniel N. Hoffman, *Freedom Vs. National Security: Secrecy and Surveillance* (New York: Chelsea House Publishers, 1977), 351.

⁵¹ Halperin and Hoffman, *Freedom Vs. National Security*, 351.

⁵² Halperin and Hoffman, *Freedom Vs. National Security*, 352.

⁵³ Stone, *War and Liberty*, 98.

Congress approved another relevant act, Public Law No. 870, on 17 October 1940. This law further constrained so-called subversive organizations, particularly communist ones, by requiring “the registration of certain organizations carrying on activities within the United States.”⁵⁴ Next, the McCarran Internal Security Act of 1950 evolved the language of the previous laws specifically to target communist organizations. The brief description of this act was “to protect the United States against certain un-American and subversive activities by requiring registration of Communist organizations.”⁵⁵ The act, in response to the opening of the Korean War, “required all Communist and other subversive organizations to disclose the names of their members” and “prohibited any person who was a member of such an organization from working in any capacity for the government or for any private employer engaged in defense work.”⁵⁶ Finally, the Communist Control Act of 1954 sought “to outlaw the Communist Party, [and] to prohibit members of Communist organizations from serving in certain representative capacities.”⁵⁷

In each of these six pieces of legislation, Congress increasingly shifted the balance away from civil liberties and towards security. The growing fears by the American people and their willingness to turn those fears into votes on Election Day led Congress to sacrifice free speech and organized political dissent *among a limited minority*. Congressional hearings were a very public aspect of this process.

Congressional Hearings. Congress established the House Un-American Activities Committee (HUAC) in 1938. Although similar committees existed previously, Congress designed the HUAC as a special investigation committee from 1938 to 1944. Led by Representative

⁵⁴ 54 Stat. 1201 (1940); “The Smith Act of 1940.”

⁵⁵ 64 Stat. 987 (1950).

⁵⁶ Stone, *War and Liberty*, 93.

⁵⁷ 68 Stat. 775 (1954).

Martin Dies, and often called the Dies Committee, it almost immediately made charges that many federal employees were subversives.⁵⁸ In 1945, the HUAC became a standing committee of Congress.

After taking control of the House and Senate in the 1946 mid-term elections, the Republicans announced “an aggressive program to expose Communist and Communist sympathizers.”⁵⁹ With the 1948 presidential elections upcoming, a republican controlled Congress sought to “launch a series of investigations in the area of ‘subversion’ in an attempt to embarrass the administration and to link it with communism.”⁶⁰ In less than a month after the start of the Eightieth Congress, thirty-five investigations were planned, “and none of these offered more bountiful political dividends than did those investigations into the field of loyalty and security.”⁶¹

Separate from the HUAC, but often associated with it, was the Senate Permanent Subcommittee on Investigations, made famous by Senator Joseph McCarthy who led the subcommittee in 1953 and 1954. After assuming control of the subcommittee, McCarthy “immediately declared his intention to investigate Communist infiltration of the federal government and of the nation’s colleges and universities.”⁶²

Presidential Actions. Presidential administrations sought to appease the American people with anti-communist measures as well. Mirroring the Congressional actions, administration responses to anti-communist sentiment persisted across the Roosevelt and Truman administrations.

Executive Order 9300. On 5 February 1943, President Roosevelt issued “Executive Order 9300 on Subversive Activities by Federal

⁵⁸ Steinberg, *The Great "Red Menace,"* 23.

⁵⁹ Stone, *War and Liberty,* 86.

⁶⁰ Steinberg, *The Great "Red Menace,"* 21.

⁶¹ Steinberg, *The Great "Red Menace,"* 21.

⁶² Stone, *War and Liberty,* 95.

Employees.”⁶³ This order established a committee to “serve as an advisory and coordinating agency in all matters pertaining to the investigation and disposition of complaints of subversive activity on the part of employees of the executive branch of the Federal Government.”⁶⁴

Executive Order 9806. Fearing a ‘soft on Communism’ image and seeing the first-hand results from the mid-term elections of 1946, President Truman quickly responded with initiatives of his own in preparation for the 1948 election, including executive orders and more aggressive foreign policy. The President signed Executive Order 9806, formally titled, “Establishing the President’s Temporary Commission on Employee Loyalty,” on 25 November 1946. The commission, delayed until November to downplay the communist issue in the upcoming election, “consisted of an interagency group with one representative from each of the following departments: Justice, State, Treasury, War, and Navy, and also an appointee from the Civil Service Commission.”⁶⁵ The Commission’s mandate included recommending “a comprehensive federal loyalty program, including standards for new applicants, procedures to be established for existing federal employees, and possible new legislation.”⁶⁶ President Truman followed this executive order early in the next year with his most famous speech on foreign policy.

The Truman Doctrine. On 12 March 1947, President Truman delivered a speech to a Joint Session of Congress. In this speech, the President started by asking Congress to support Greece as it struggled with “terrorist activities of several thousand armed men, led by

⁶³ John T. Woolley and Gerhard Peters, "Franklin D. Roosevelt -- Executive Order 9300 on Subversive Activities by Federal Employees," UC Santa Barbara, www.presidency.ucsb.edu/ws/index.php?pid=16331#axzz1GaZ3Y4YJ (accessed 14 March 2011).

⁶⁴ Woolley and Peters, "Franklin D. Roosevelt -- Executive Order 9300 on Subversive Activities by Federal Employees."

⁶⁵ Steinberg, *The Great "Red Menace,"* 24.

⁶⁶ Steinberg, *The Great "Red Menace,"* 24.

Communists, who defy the government's authority.”⁶⁷ It was necessary for the United States to support Greece, the President urged, if Greece was to rebuild after the war and grow into a “self-supporting and self-respecting democracy.”⁶⁸ Next, President Truman addressed Turkey, declaring American support vital to the “modernization necessary for the maintenance of [Turkey’s] national integrity ... essential to the preservation of order in the Middle East.”⁶⁹ A little later in the speech, President Truman painted a picture of the domino effect.

If Greece should fall under the control of an armed minority, the effect upon its neighbor, Turkey, would be immediate and serious. Confusion and disorder might well spread throughout the entire Middle East. Moreover, the disappearance of Greece as an independent state would have a profound effect upon those countries in Europe whose peoples are struggling against great difficulties to maintain their freedoms.... Should we fail to aid Greece and Turkey in this fateful hour, the effect will be far reaching to the West as well as to the East.⁷⁰

Although the speech referred to communism by name only once, several key messages were clear. First, the newly verbalized ‘Truman Doctrine’ made containment the backbone of its strategy and it “stated implicitly that the United States would support global democracy in the fight against communism.”⁷¹ As stated by Truman in his speech, “It must be the policy of the United States to support free peoples who are resisting attempted subjugation by armed minorities or by outside pressures.”⁷² Secondly, it solidified the thinking that communism was the greatest threat to the American people. However, nothing within this

⁶⁷ Harry S. Truman, "The Truman Doctrine," American Rhetoric, www.americanrhetoric.com/speeches/harrystrumantrumandocctrine.html (accessed 17 February 2011).

⁶⁸ Truman, "The Truman Doctrine."

⁶⁹ Truman, "The Truman Doctrine."

⁷⁰ Truman, "The Truman Doctrine."

⁷¹ Manor, "The Home Front," 27.

⁷² Truman, "The Truman Doctrine."

particular speech, focused squarely on Greece and Turkey, alluded to a threat within America itself.

Executive Order 9835. Less than two weeks after Truman's famous speech, the President addressed domestic concerns by signing Executive Order 9835, implementing a loyalty program based on the findings from the commission established under Executive Order 9806. The introductory text of this order noted, "The presence within the Government service of any disloyal or subversive person constitutes a threat to our democratic processes."⁷³

Comprehensive investigations would determine loyalty. Simply belonging to or associating with an organization designated by the Attorney General as "totalitarian, fascist, communist, or subversive" would be enough to question loyalty.⁷⁴ The list of suspect organizations quickly swelled to over 250. With groups added to the list continually, the best course of action was to avoid any associations.

Judicial Review. By design, the judiciary is an anchor in the storm, upholding Constitutional rights by providing checks and balances on the executive and legislative branches. By upholding the Constitution, the judiciary should restrain the majority before it suppresses the minority. Article III of the Constitution dictates life terms for federal judges and proclaims that, "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour."⁷⁵ This measure helps divorce the judiciary from the current political atmosphere, eliminating influences such as lobbyists and re-election campaigns.

Yet the judiciary and its guiding texts do not exist in a vacuum. Context still matters. Freedom of speech does not apply to all speech by

⁷³ Harry S. Truman, "Executive Order 9835," Harry S. Truman Library & Museum, www.trumanlibrary.org/executiveorders/index.php?pid=502 (accessed 17 May 2011).

⁷⁴ Truman, "Executive Order 9835."

⁷⁵ The Constitution of the United States, Article III, Section 1.

all people at all times. In essence, there is no way to ensure civil liberties in a completely objective manner. Furthermore, there is an ability to restore the balance between civil liberties and national security after the threat subsides. This enables civil liberties to contract even more during times of threat, since those actions are at least notionally temporary. When associated with threats to national security, the courts demonstrated the value of political context to civil liberties.

The actions by both Congress and the presidents “did little to quell the apprehension of the American people.”⁷⁶ Instead, they “greatly enhanced and legitimized the existing fear.”⁷⁷ In 1949, this fear led to the trial of 11 American Communist Party leaders, tried for “‘conspiracy to teach and advocate the duty and necessity of overthrowing’ the United States government.”⁷⁸ By targeting communists in federal court, the judiciary found itself with an opportunity to weigh in on the issue of civil liberties versus national security during times of crisis. A quick look at the Supreme Court’s basis for freedom of speech and the legal precedents at play prior to the Second Red Scare help demonstrate this assessment. One key precedent was a case dating back to World War I.

Schenck v. United States (1919). The idea that freedom of speech has its limits is not contained within the Bill of Rights. Relevant court rulings shaped this notion. *Schenck v. United States* is notable. “Charles Schenck, who was general secretary of the Socialist Party, had overseen the printing of 15,000 leaflets that characterized the draft as a violation of the Thirteenth Amendment, criticized World War I as a ‘monstrous wrong against humanity in the interests of Wall Street’s chosen few,’ and urged recipients to assert their rights.”⁷⁹ The lower court convicted Schenck with violating the Espionage Act of 1917 in an

⁷⁶ Manor, “The Home Front,” 28.

⁷⁷ Steinberg, *The Great “Red Menace,”* 29.

⁷⁸ Steinberg, *The Great “Red Menace,”* xiii.

⁷⁹ Donald E. Lively, *Landmark Supreme Court Cases: A Reference Guide* (Westport, Conn.: Greenwood Press, 1999), 168.

act “attempting to cause insubordination ... in the military and naval forces of the United States.”⁸⁰ The Supreme Court debated “whether a conviction for distributing antiwar leaflets to military personnel violated the First Amendment guarantee of freedom of speech.”⁸¹ The Court’s ruling, delivered by Justice Oliver Wendell Holmes, referred to previous cases of freedom of speech, noting the observation in *Aikens v. Wisconsin* that, “The character of every act depends upon the circumstances in which it is done.”⁸² In essence, *the context of speech matters as much as what is said*. Hence, falsely screaming “fire!” in a crowded theater is against the law. Yet the criteria for deciding what context permitted what speech lacked clarity at the time. Justice Holmes would spell out criteria for future cases.

The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional rights.⁸³

The phrase ‘clear and present danger’ was thus born and provided a standard measure for the limits freedom of speech. As summarized by Donald Lively in *Landmark Supreme Court Cases*, the Court’s ruling decreed, “Freedom of speech does not protect speech that creates a clear and present danger that government has a valid interest in preventing.”⁸⁴ Although the concept of protecting against ‘clear and present danger’ was

⁸⁰ Halperin and Hoffman, *Freedom Vs. National Security*, 449.

⁸¹ Lively, *Landmark Supreme Court Cases*, 167.

⁸² Halperin and Hoffman, *Freedom Vs. National Security*, 450.

⁸³ Halperin and Hoffman, *Freedom Vs. National Security*, 450.

⁸⁴ Lively, *Landmark Supreme Court Cases*, 167.

itself subjective, it would be the guiding standard for at least the next thirty years.

Dennis v. United States (1951). On 20 July 1948, a grand jury formally indicted and subsequently arrested eleven leaders of the American Communist Party under the Smith Act.⁸⁵ “The 11 top leaders of the American Communist party were indicted under the act for willfully and knowingly conspiring to teach and advocate the overthrow of government by force and violence, and to organize the Communist party for the purpose of doing so.”⁸⁶ Officials timed the arrests to occur after the Democratic Party convention concluded, in an effort to reinforce the President’s anti-communist image.⁸⁷

The trial would not start until 17 January 1949.⁸⁸ In his deliberations, Judge Medina, a US district court judge, applied the ‘clear and present danger’ test in the trial of eleven members of the American Communist Party, but found that it did not go far enough. Ruled Medina: “It seems to me absurd on its face to say, as you do, that there must be a clear and present danger of immediate overthrow to justify prosecution. By any such test the Government would be overthrown before it could protect itself and the very important right of freedom of speech would be gone with all the other freedoms.”⁸⁹

In the Court of Appeals, Judge Learned Hand upheld the conviction.⁹⁰ In 1951, the US Supreme Court upheld the lower court’s ruling. Chief Justice Fred Vinson authored the majority opinion, commending the revised standard measure for freedom of speech: “whether the gravity of the ‘evil,’ discounted by its improbability, justifies

⁸⁵ Steinberg, *The Great "Red Menace,"* 119.

⁸⁶ Robert Fairchild Cushman, *Leading Constitutional Decisions*, 16th ed. (Englewood Cliffs, N.J.: Prentice-Hall, 1982), 210.

⁸⁷ Steinberg, *The Great "Red Menace,"* 120.

⁸⁸ Steinberg, *The Great "Red Menace,"* 157.

⁸⁹ Steinberg, *The Great "Red Menace,"* 177.

⁹⁰ Cushman, *Leading Constitutional Decisions*, 210.

such invasion of free speech as is necessary to avoid the danger.”⁹¹ Temporal factors became less of a consideration. Judge Hand’s “clear and probable danger” standard replaced the earlier standard of “clear and present danger.”⁹² “The danger need not be imminent; It is enough that there is a group willing to attempt the overthrow of government if and when possible.”⁹³ In short, freedom of speech became a utility calculation, weighing the costs of restricting speech against the risk of not restricting speech, with consideration of the likelihood of its probability to produce danger. In other words, the ends could justify the means based upon context.

The Aftermath

The external threat of communism during the Cold War would persist for several decades, but the domestic threat of communism subsided much quicker. As fear subsided and normalcy returned the restoration of civil liberties followed suit.

Not everyone believed that the exaggerated response, tagged with the catchphrase “McCarthyism,” was good for the nation. Eugene Dennis of *Dennis v. United States* (1951), head of the Communist Party USA, in his last prepared speech before surrendering to federal authorities argued that the decision in his case “signalizes the blotting out of constitutional guarantees and threatens the breakdown of *all* the institutions of bourgeois democracy” (emphasis in original).⁹⁴

Justice Hugo Black argued in his dissent, “There is hope, however, that in calmer times, when the present pressures, passions and fears subside, this or some later Court will restore the First Amendment liberties to the high preferred place where they belong in a free society.”⁹⁵

⁹¹ Steinberg, *The Great "Red Menace"*, 223.

⁹² Cushman, *Leading Constitutional Decisions*, 210.

⁹³ Cushman, *Leading Constitutional Decisions*, 210.

⁹⁴ Steinberg, *The Great "Red Menace"*, 228.

⁹⁵ "*Dennis V. United States*, 341 U.S. 494 (1951)," Find Law, <http://laws.findlaw.com/us/341/494.html> (accessed 18 February 2011).

His prophecy would emerge slowly as McCarthyism and the Second Red Scare eventually lost momentum.

Executive Order 10450. Signed by President Eisenhower in 1953, Executive Order 10450 rescinded Truman's Executive Order 9835 that created the Loyalty Program for federal employees.

Popular Media. The popular media became increasingly skeptical of anti-communism and McCarthyism in particular. The 22 October 1951 cover of Time Magazine featured a picture of Senator McCarthy with the caption, "DEMAGOGUE MCCARTHY – Does he deserve well of the republic?"⁹⁶ The corresponding feature asked three questions regarding McCarthy: "1) Precisely what has McCarthy done? 2) Is his effect on the U.S. good or bad? 3) Does he deserve well of the republic, or should he be treated with aversion and contempt?"⁹⁷ The article considered McCarthy's tactics "reckless imputation of treason" but placed the blame well beyond McCarthy alone.⁹⁸

McCarthy's Censure. In 1953, McCarthy made a strategic error by attacking the US Army, alleging "Communist infiltration of the military."⁹⁹ The hearings with the US Army would start the unraveling of McCarthy's support. Following the hearings, McCarthy's popularity eroded. Plus, his numerous accusations and investigations failed to identify a single communist working in a sensitive defense department or produce the single conviction of a communist spy.¹⁰⁰

That same year, President Truman "made a nationally televised speech in which he accused the Eisenhower administration of 'shameful demagoguery' and defined McCarthyism as a 'horrible cancer [that] is

⁹⁶ "Joseph R. Mccarthy," Time Magazine, www.time.com/time/covers/0,16641,19511022,00.html (accessed 18 February 2011).

⁹⁷ "Congress: Weighted in the Balance," *Time*. Vol. LVIII, no. 17: 21-24.

⁹⁸ "Congress: Weighted in the Balance," 21-24.

⁹⁹ Stone, *War and Liberty*, 102.

¹⁰⁰ Stone, *War and Liberty*, 103.

eating at the vitals of America.”¹⁰¹ Even Milton Eisenhower, the president’s brother, “publicly described McCarthy as ‘the most dangerous menace’ to the nation.”¹⁰² In 1954, with Senator McCarthy’s credibility destroyed and popularity sinking, Congress censured the megalomaniac senator for attacking fellow senators.¹⁰³ In response, McCarthy claimed, “the Communist Party ‘has now extended its tentacles even to ... the United States Senate.’”¹⁰⁴ In 1956, McCarthy, forty-nine years old and an alcoholic, died from cirrhosis of the liver.¹⁰⁵

Less Hostile Coexistence. In 1955, the heads of state for the United States, the Soviet Union, Britain, and France met together during the Geneva Conventions.¹⁰⁶ This meeting dubbed “The Spirit of Geneva,” though lacking progress on arms control, did help ease tensions between the two countries and ushered in a “new, less hostile phase of the Cold War.”¹⁰⁷ “By 1957 it was widely accepted that an internal ‘Red Menace’ no longer existed.”¹⁰⁸

Today the American Communist Party, renamed as the Communist Party USA, has a website at www.cpusa.org. Although membership is down from its height from 80,000-100,000 between 1946 and 1948, it still conducts an annual convention.¹⁰⁹

¹⁰¹ Stone, *War and Liberty*, 96.

¹⁰² Stone, *War and Liberty*, 96.

¹⁰³ Stone, *War and Liberty*, 103.

¹⁰⁴ Stone, *War and Liberty*, 104.

¹⁰⁵ Stone, *War and Liberty*, 104.

¹⁰⁶ Steinberg, *The Great "Red Menace,"* 265.

¹⁰⁷ "Geneva Convention Begins—July 18, 1955," The Miller Center of Public Affairs, http://millercenter.org/president/events/07_18 (accessed 15 March 2011).

¹⁰⁸ Steinberg, *The Great "Red Menace,"* 283.

¹⁰⁹ Danny Rubin, "Are We Overlooking Anything in the Fight to Build the Party?" Communist Party USA, www.cpusa.org/are-we-overlooking-anything-in-the-fight-to-build-the-party/ (accessed 18 February 2011).

Restoration of Civil Liberties. Although the Second Red Scare lasted a decade, eventually the American people longed for “the kind of give and take which is the lifeblood of political democracy.”¹¹⁰

On 17 June 1957, the Supreme Court reversed the conviction of fourteen California communists charged under the Smith Act.¹¹¹ One of the defendants “suggested that the impetus for the decision resulted less from changing legal interpretation than from changing world and domestic conditions.”¹¹²

The Pattern

The pattern of behavior exhibited in this case study mirrored the brief examples in the first chapter. In this case study, the threat gradually escalated rather than igniting through a crisis. Once the multi-polar world faded with the end of World War II, the new political context emphasized hostilities with the Soviets and fears of communism through internal subversion. Soviet atomic capabilities, Stalin’s expansionist rhetoric, and growing communist control abroad produced tangible fears magnified by election politics and high-profile trials of American spies. Indeed, it was the threat to American ideals and the primacy of democracy that Americans feared most because overthrow from within comes without warning. The othering in this case applied to communists, abroad and at home. The restriction of civil liberties, most notably free speech, either actively or passively through membership or affiliation with a political organization, was designed to meet the demand from the voting public. The response by the political process came in many forms, including several laws such as the Alien Registration Act of 1940, and hearings before the House Committee on Un-American Activities and the Senate Permanent Subcommittee on Investigations. It also included convictions of American Communists and presidential

¹¹⁰ Steinberg, *The Great "Red Menace,"* 254.

¹¹¹ Steinberg, *The Great "Red Menace,"* 261.

¹¹² Steinberg, *The Great "Red Menace,"* 261.

executive orders creating a loyalty program for federal employees. Above all, the responses fed the need of the majority and with the blessings of the Supreme Court.

Eventually, the American people grew tired of these fears and the pendulum swung back. With the reversal of American Communist convictions, Executive Order 10450, censure of Senator McCarthy and the demise of McCarthyism, the original balance between civil liberties and national security re-emerged.

Conclusion

Although many believe the real threat from communism revolved around atomic weapons, and this is likely true in hindsight, the reason for restricting civil liberties *within* the United States was something much different. It was about the fear of subversion and the potential loss of democratic ideals through a vast internal conspiracy with ties to external communist movements.

Initially, communism presented an external threat. Communist expansion existed in earnest and led to a standoff in Berlin, and proxy wars in Korea and Vietnam. Fears of communist influence in America led to concern over an internal threat. Politicians used election politics to magnify and legitimize this fear. An increasingly fearful public demanded security from this threat by their government. Isolating communists as a minority, the government responded, limiting freedom of speech for those within the minority. Eventually, after fears quieted, normalcy returned, allowing restoration of civil liberties to the minority. Some expressed remorse over the actions taken during this period in American history. Overall, this episode reinforced the pattern of a typical American response for an internal threat to national security.

In retrospect, the prosecution of American citizens for espionage validated some concern for communists within the United States. However, KGB files discovered later indicated only 200 to 400 Soviet

agents within the United States.¹¹³ Moreover, the danger they posed was far less than thought. As Geoffrey Stone noted, “The danger these individuals presented was not the subversion of the American people. It was the danger of espionage and sabotage.”¹¹⁴ Yet, reality matters little during a time of threat. What matters most is the perception of the threat. By exercising the power of voting, particularly in the 1946 mid-term elections, the American public demanded a response to the threat of communism that all three branches of government, even the judiciary, were more than willing to meet.

¹¹³ Stone, *War and Liberty*, 104.

¹¹⁴ Stone, *War and Liberty*, 104.

Chapter 3

9/11 and Radical Islamic Terrorists

The terrorist attacks of 9/11 changed the collective psyche of the nation similar to the attacks of Pearl Harbor nearly sixty years earlier. In the words of President Bush less than a week after 9/11, "Everyone who wears the uniform should get ready. We're at war."¹ After the initial confusion subsided, it was clear that the United States had been the victim of a calculated and coordinated attack. Yet this attack differed from Pearl Harbor in two significant ways. First, terrorists posed as civilians rather than armed combatants. Second, the terrorists launched their attack from *within* the United States. Thus, additional attacks by other terrorists disguised as law-abiding citizens or foreign residents already within American borders seemed highly plausible.

The eventual response under the banner 'Global War on Terror' included the PATRIOT Act, creation of the Department of Homeland Security and the Transportation Security Agency, and Operations Enduring Freedom and Iraqi Freedom, among others. These actions triggered fascinating debates, most still unresolved, on the proper balance between civil liberties and national security, especially issues relating to freedom of speech and privacy.

The significant change in two factors in this case study stand out. First, by 9/11 the evolving political environment made previous othering efforts politically untenable. This explains, for example, the lack of long-term or indefinite detention or internment of Arab-Americans or Muslim-Americans.² Second, the growing role of technology altered the average

¹ Ed Vulliamy et al., "Get Ready for War, Bush Tells America," *The Guardian*, www.guardian.co.uk/world/2001/sep/16/terrorism.september11 (accessed 17 March 2011).

² "The September 11 Detainees." US Department of Justice, www.justice.gov/oig/special/0306/full.pdf (accessed 23 March 2011). The Justice Department's report indicated 738 aliens were arrested between 11 September 2001

American citizen's expectations with regards to privacy. Thus, there are few demands by the voters to eliminate electronic surveillance that is not disruptive, humiliating, or invasive. The following examination follows the pattern established earlier by first considering the threat.

Post-9/11 Radical Islamic Terrorists and Civil Liberties

The Threat

Acts of terror committed in the United States themselves were not new concerns in 2001. On 19 April 1995, Timothy McVeigh bombed the Oklahoma City federal building, killing 168 people, including 19 children. Congress "immediately felt tremendous pressure to pass antiterrorism legislation."³ The result was the 1996 Antiterrorism Act. To some, the 1996 Antiterrorism Act contained "some of the worst assaults on civil liberties in decades."⁴ For one, the law revived "the principle of 'guilt by association' that had defined the McCarthy era" by making it a crime to provide any material or humanitarian support to any organization designated as "terrorist" by the Secretary of State.⁵ Similar to the blacklisting of communist organizations during the Second Red Scare, the law made it illegal to belong to certain designated organizations. In other words, the law exercised the principle of guilt by association by claiming that supporting an organization designated as "terrorist" made the individual a terrorist regardless of the degree of support or involvement. Furthermore, it put the power of determining "terrorist" organization solely into the hands of the Secretary of State. If the Secretary of State were to abuse his or her power, he or she could

and 6 August 2002 as a result of a Federal Bureau of Investigation operation in addition to 24 already in INS custody on 11 September 2001. The report also noted that the average duration from arrest to clearance from the sample of cases examined was 80.1 days. Overall, this indicated an individually targeted detainment process with very short-term detainment.

³ David Cole and James X. Dempsey, *Terrorism and the Constitution: Sacrificing Civil Liberties in the Name of National Security*, [3rd ed. (New York: New Press, 2006)], 113.

⁴ Cole and Dempsey, *Terrorism and the Constitution*, 117.

⁵ Cole and Dempsey, *Terrorism and the Constitution*, 117-118.

designate an undesirable organization or one critical of the government as “terrorist.” However, al-Qaeda is one organization that would satisfy any definition of terrorist organization.

Al-Qaeda. American intelligence agencies were well aware of al-Qaeda before the morning of 9/11. Osama Bin Laden, its leader, was on the FBI’s “Most Wanted Terrorists” list since the 1998 bombings of American embassies in Africa.⁶ In February of that year, the World Islamic Front, led by Osama bin Laden, Ayman al Zawahiri, and three others, issued a religious ruling—fatwa—against the United States and its allies. The fatwa declared, “The ruling to kill the Americans and their allies -- civilians and military -- is an individual duty for every Muslim who can do it in any country in which it is possible to do it.”⁷ When interviewed three months later by ABC-TV, bin Laden expanded on his proclamation. “It is far better for anyone to kill a single American soldier than to squander his efforts on other activities.”⁸ When asked about killing civilians, bin Laden replied, “We do not have to differentiate between military or civilian. As far as we are concerned, they are all targets.”⁹ Later that year, al-Qaeda started to make good on its promise with an attack on the American embassies in Africa that killed dozens and injured thousands more.¹⁰ Then, in 2000, al-Qaeda terrorists rammed the USS Cole in Yemen with a small boat filled with explosives, killing 17 US sailors and injuring 39 others.¹¹ Multiple American

⁶ “Most Wanted Terrorists,” Federal Bureau of Investigations, www.fbi.gov/wanted/wanted_terrorists (accessed 17 March 2011).

⁷ “Al Qaeda's Fatwa,” MacNeil/Lehrer Publications, www.pbs.org/newshour/terrorism/international/fatwa_1998.html (accessed 17 March 2011).

⁸ National Commission on Terrorist Attacks upon the United States, *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States*, Authorized ed. (New York: Norton, 2004), 47.

⁹ National Commission on Terrorist Attacks upon the United States, *The 9/11 Commission Report*, 47.

¹⁰ Howard Ball, *The USA Patriot Act of 2001: Balancing Civil Liberties and National Security* (Santa Barbara, Calif.: ABC-CLIO, 2004), 12.

¹¹ Ball, *The USA Patriot Act of 2001*, 13.

intelligence agencies suspected that al-Qaeda was preparing for an attack on US soil.

When President-elect George W. Bush received a national security briefing in January 2001, CIA Director George Tenet briefed that Osama bin Laden and his al-Qaeda terrorist networks were one of three major threats to the United States.¹² Bob Woodward noted, “There was no doubt that bin Laden was going to strike at United States interests in some form. It was not clear when, where, by what means.”¹³ On the morning of 9/11, these details became clear, but it was unknown whether 9/11 marked the beginning or end of massive attacks. Unlike other formal enemies constrained by statehood, 9/11 made it clear that the United States could not deter Osama bin Laden and al-Qaeda using traditional means. This was largely due to bin Laden’s and al-Qaeda’s ideology.

Radical Islamic Terrorists. A form of radical Islam called takfirism, based on the ideology of Egyptian writer Qutb, drove the religious ideology of Osama bin Laden and al-Qaeda. It is an extreme form of salafism that calls for withdrawal from the non-Muslim jahili society.¹⁴ According to Qutb, a “jahili” society is one that “does not dedicate itself to submission to God alone, in its beliefs and ideas, in its observances of worship, and in its legal regulations.”¹⁵ Furthermore, takfirism permits targeting fellow Muslims.¹⁶ In short, the radical Islam practiced by al-Qaeda leaves little room for compromise and negotiation, unwilling to spare even fellow Muslims. Additionally, if al-Qaeda was willing to target American civilians, then it seemed plausible it would have no qualms using weapons of mass destruction.

¹² Bob Woodward, *Plan of Attack* (New York: Simon & Schuster, 2004), 12.

¹³ Woodward, *Plan of Attack*, 12.

¹⁴ Scott Atran, *Talking to the Enemy: Faith, Brotherhood, and the (Un)Making of Terrorists* (New York, NY: Ecco, 2010), 100.

¹⁵ Seyyid Qutb, *Milestones* (Damascus: Dar Al-Ilm, 2002), 80.

¹⁶ Atran, *Talking to the Enemy*, 101.

Weapons of Mass Destruction (WMD). Although the ties were loose, some in the federal government believed there were connections between Osama bin Laden and both Iraq and Iran. After 9/11, Deputy Secretary of Defense Paul Wolfowitz estimated that “there was a 10 to 50 percent chance Saddam was involved in the 9/11 attacks,” despite the lack of actual evidence.¹⁷ If Iraq had WMD, it might provide those capabilities to al-Qaeda in another spectacular attack. President Bush verbalized the logic when he discussed the rationale for Operation Iraqi Freedom. In an interview with the United Kingdom’s ITV Television Network, he stated, “The worst thing that could happen would be to allow a nation like Iraq, run by Saddam Hussein, to develop weapons of mass destruction, and then team up with terrorist organizations so they can blackmail the world.”¹⁸ Many, the president included, simply could not rule out WMD when it came to al-Qaeda. Even without WMD, 9/11 proved that al-Qaeda had successfully infiltrated the US. With or without WMD, a new wave of attacks was a constant fear.

Further Attacks. Similar to Pearl Harbor, the United States feared further attacks in the wake of 9/11. Commercial air travel during September and October of 2001 dropped 34 and 21 percent respectively from the previous year, contrasting with the 3 percent increase seen during August of 2001.¹⁹ Not until 2004 would commercial air travel return to its pre-9/11 levels, indicating the lingering fear.²⁰

An Elusive Threat. The fact that the threat hid in plain sight exacerbated the fear. After all, the attackers entered the country undetected by US intelligence agencies, and then boarded aircraft undetected by airport security, and killed nearly three thousand Americans in a single morning. Additionally, the connection between al-

¹⁷ Woodward, *Plan of Attack*, 26.

¹⁸ Woodward, *Plan of Attack*, 120.

¹⁹ Amitai Etzioni, *How Patriotic Is the Patriot Act?: Freedom Versus Security in the Age of Terrorism* (New York: Routledge, 2004), 15.

²⁰ Etzioni, *How Patriotic Is the Patriot Act*, 16.

Qaeda and WMD seemed at the very least plausible. Americans could not be certain there were no more terrorists already on US soil, and whether or not they possessed WMD, and who was and was not a target. One thing was clear—the government needed to respond “to preempt any further attacks.”²¹ Geoffrey Stone reiterated this feeling, noting that “Americans expected and, indeed, demanded that their government take immediate and decisive steps to protect them.”²²

In this environment of fear, civil liberties again played second fiddle while security took center stage. Polls after 9/11 indicated that many Americans were willing to make sacrifices in order to defend against further attacks. For example, an ABC News/Washington Post poll taken on 9/11 indicated that 66 percent of respondents were “willing to give up some of the liberties we have in this country in order for the government to crack down on terrorism.”²³ Likewise, a Gallup Poll conducted between January and March 2002 showed 78 percent of respondents were “now more willing to give up certain freedoms to improve safety and security than ... before September 11th.”²⁴ But what liberties should be lost and who would lose them?

The Othering

Radical Islamic terrorists were the true threat after 9/11. All were Arab males in their 20’s or 30’s.²⁵ At the time, Arab-Americans composed less than one-half of one percent of the American population.²⁶

²¹ M. Katherine B. Darmer, Robert M. Baird, and Stuart E. Rosenbaum, *Civil Liberties Vs. National Security in a Post-9/11 World* (Amherst, N.Y.: Prometheus Books, 2004), 11.

²² Geoffrey R. Stone, *War and Liberty: An American Dilemma: 1790 to the Present* (New York: W.W. Norton, 2007), 128.

²³ Etzioni, *How Patriotic Is the Patriot Act*, 18, Table 2.

²⁴ Etzioni, *How Patriotic Is the Patriot Act*, 18, Table 2.

²⁵ National Commission on Terrorist Attacks upon the United States., *The 9/11 Commission Report*, 238-239.

²⁶ U.S. Census Bureau, "The Arab Population: 2000." U.S. Census Bureau, www.census.gov/prod/2003pubs/c2kbr-23.pdf (accessed 23 March 2011). The 2000 US census identified 1.2 million Arabs out of a total population of 281.4 million.

Additionally, the terrorists and Al-Qaeda's leaders were Islamic extremists. Muslim-Americans were also a small minority within the United States. Hence, the opportunity for othering Arabs and Muslims clearly existed. Isolating these minorities would theoretically address all would-be terrorists in waiting.

Indeed, many Americans supported a targeted response. Polls conducted after 9/11 showed 32 percent of Americans favored "special surveillance" for Arabs.²⁷ Another poll indicated "66 percent of respondents favoring 'heightened surveillance of Middle Eastern immigrants.'"²⁸ However, despite the distinct opportunity for othering along predominately ethnic or religious distinctions, several cultural factors prevented the government from doing so.

Lessons Learned from Pearl Harbor. Following the Japanese internment, "a consensus gradually developed that it had been a mistake."²⁹ Both Democratic and Republican presidents offered apologies, President Ford rescinded Executive Order 9066, and survivors received reparations in 1988.³⁰ This lesson significantly influenced Congress during the 9/11 crisis, and the PATRIOT Act specifically addressed this concern. In fact, section 102 (a) (1) states, "Arab Americans, Muslim Americans, and Americans from South Asia play a vital role in our Nation and are entitled to nothing less than the full rights of every American."³¹ Section 102 (b) (1) goes on to say, "The civil rights and civil liberties of all Americans, including Arab Americans, Muslim-Americans, and Americans from South Asia, must be protected, and that every effort must be taken to preserve their safety."³² Three factors help explain this newly found tolerance: the legislative constraints

²⁷ Darmer, Baird, and Rosenbaum, *Civil Liberties Vs. National Security*, 121.

²⁸ Darmer, Baird, and Rosenbaum, *Civil Liberties Vs. National Security*, 121.

²⁹ Darmer, Baird, and Rosenbaum, *Civil Liberties Vs. National Security*, 152.

³⁰ Darmer, Baird, and Rosenbaum, *Civil Liberties Vs. National Security*, 152.

³¹ Public Law 107-56; 115 Stat. 276-277.

³² Public Law 107-56; 115 Stat. 276-277.

placed on the executive, the civil rights movement, and the global mass media.

Legislative Constraints. Jack Goldsmith, author of *The Terror Presidency*, argued that the executive is increasingly wary of actions that might warrant later legal action. He contrasted President Roosevelt's actions in the wake of Pearl Harbor as politically constrained versus those by President Bush which were legislatively constrained with legal implications, noting that the number of lawyers has grown exponentially over the last several decades.³³ Since the Second Red Scare, the country had gone through Vietnam, Watergate, and the Iran-Contra scandal.³⁴ Indeed, key legislation after Watergate and Vietnam, including a domestic wiretapping law, the Foreign Intelligence Surveillance Act, and the War Powers Act all focused on limiting the power of the executive rather than expanding it.³⁵ In addition to the growing legislative constraints, the nation had become more sensitive to ethnic and religious discrimination as a result of the civil rights movement.

The Civil Rights Movement. Several milestones in the civil rights movement within the United States did not occur until after the end of the Second Red Scare. In 1963, for example, Martin Luther King delivered his "I Have a Dream" speech in Washington, DC. In 1964, President Johnson signed the Civil Rights Act, outlawing "discrimination of all kinds based on race, color, religion, or national origin."³⁶ In 1992, the country witnessed the tragedy of the race riots after the acquittal of four white policemen accused of beating Rodney King, an African-American.³⁷ Unlike 1941, in 2001 the nation was less willing to "other"

³³ Jack L. Goldsmith, *The Terror Presidency: Law and Judgment inside the Bush Administration* (New York: W.W. Norton & Co., 2007), 48-49, 91.

³⁴ Goldsmith, *The Terror Presidency*, 49, 68.

³⁵ Goldsmith, *The Terror Presidency*, 66.

³⁶ Borgna Brunner and Elissa Haney, "Civil Rights Timeline." Information Please, www.infoplease.com/spot/civilrightstimeline1.html (accessed 23 March 2011).

³⁷ Brunner and Haney, "Civil Rights Timeline."

an entire minority, despite the shock of the attack and widespread fear. Despite some discrimination and isolated incidents of violence towards Arabs, there were no massive civil liberty violations directed at an entire minority. The influence of the global mass media was another factor contributing to this outcome.

Global Mass Media. Both Japanese internment and the Second Red Scare occurred before the age of the personal computer and the internet. By 2001, the role of the global mass media had changed significantly due to these innovations. Any attempt to limit civil liberties along racial or ethnic lines would appear hypocritical of the United States as a country which prides itself as a “melting pot” country of immigrants. However, unlike earlier crises, new capabilities existed to spread the word about intolerance and discrimination. Online news outlets stood ready to capture pictures and stories for distribution to a global audience within minutes.

The growth in legislative constraints, civil rights, and mass media combined to inhibit the willingness to “other” along ethnic or religious demographics. These factors help explain why President Bush used his considerable influence to help prevent the country from repeating its actions during World War II and the Second Red Scare.

Presidential Influence. In a joint session before Congress on 20 September 2001, President Bush addressed the nation and dealt with targeting Arab and Muslim-Americans unfairly. The President proclaimed, “The enemy of America is not our many Muslim friends; it is not our many Arab friends. Our enemy is a radical network of terrorists, and every government that supports them.”³⁸ Unlike the response following Pearl Harbor, President Bush delineated Arabs and Muslims

³⁸ George W. Bush, “Address to a Joint Session of Congress Following 9/11 Attacks,” American Rhetoric, www.americanrhetoric.com/speeches/gwbush/gwbush911jointsessionspeech.htm (accessed 23 March 2011).

from those that were terrorists and responsible for the attacks. In the opinion of author Geoffrey Stone, “President George W. Bush earned high marks for immediately cautioning the public against hostile reactions to Muslims and Muslim-Americans.”³⁹ Yet, a response was still required and the government’s solution hinged largely on exploiting new technologies.

The Influence of Technology. As stated earlier, the threat was from an extremely small group of radical Islamic terrorists within US borders. That offered little solace since terrorists hide within the population. Additionally, the changing environment discouraged othering an associated and narrow swath of the population such as Arab or Muslims.

This meant the only option remaining was to target the population writ large. Therefore, the US government used a tactic similar to the Sedition Act of 1798 and Lincoln’s suspension of habeas corpus, targeting the threat through broadly applied actions. In short, the government’s response restricted the freedom of speech and privacy for all, but assumed it would only affect those that were a threat to national security.

This time, the difference was the role played by emerging surveillance technologies. Good intelligence was critical to improving security in the wake of 9/11. After all, counterterrorism requires “information about who is planning what with whom.”⁴⁰ Advanced surveillance technologies enabled a broadly applied response to gather information on potential terrorist activities while also avoiding the traditional problems with invasion of privacy. Although this infringed on the previously accepted norms of privacy for all, the government argued that only those who were terrorists need worry.

³⁹ Stone, *War and Liberty*, 128.

⁴⁰ Stone, *War and Liberty*, 140.

The Response

The initial response to 9/11 from Congress and the public was “almost blindly to support the president’s demand for additional powers.”⁴¹ Geoffrey Stone summarized the response as including “secret detention of thousands of noncitizens; secret deportation proceedings; secret and indefinite detention of American citizens; expanded surveillance of political and religious groups and activities; [and] warrantless interception of telephone calls and e-mail communications.”⁴² The response affected civil liberties’ norms with regard to privacy and specifically the Fourth Amendment.

Fourth Amendment. The Fourth Amendment states that, “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”⁴³ The Fourth Amendment outlines the desired balance between civil liberty and security with regard to searches. It permits *reasonable* searches but not *unreasonable* searches and the issuance of a warrant provides a check on what is reasonable for the circumstances.⁴⁴ Originally this protection existed only against a physical search of a person and his property since searches are by their nature “disruptive, humiliating, and invasive of personal property.”⁴⁵ However, in 1967 the Supreme Court interpreted the Fourth Amendment as encompassing the contents of a telephone conversation, expanding the Fourth Amendment beyond protection against unreasonable searches and into preventing invasions of

⁴¹ Stone, *War and Liberty*, 132.

⁴² Stone, *War and Liberty*, 130.

⁴³ US Constitution, Amendment IV.

⁴⁴ Etzioni, *How Patriotic Is the Patriot Act*, 44.

⁴⁵ Stone, *War and Liberty*, 158.

privacy.⁴⁶ In the digital age, the right to privacy affects far more than telephone conversations, but also e-mails, voice mails, and text messages. Thus, intercepting the content or even addressing of e-mails without a warrant might not be disruptive, humiliating, or invasive, but it could be a violation of privacy. Both the Supreme Court and Congress addressed the role of technology as it applies to privacy prior to 9/11.

United States v. United States District Court (1972). In 1972, the Supreme Court heard a case about a group of Vietnam War protesters that tried to blow up a CIA recruiting office. The prosecution tried using evidence “obtained during a domestic national security wire interception, secured without a formal court order.”⁴⁷ The Court ruled that “even in national security investigations the president has no constitutional authority to wiretap American citizens on American soil without a judicially issued search warrant based on probable cause.”⁴⁸ In short, the Court decided that the ends do not justify the means. There must be a warrant issued to meet the burden of probable cause before an invasion of privacy can occur. The Court also urged Congressional action to refine the requirements for domestic security cases.⁴⁹ Congress complied with the Court’s findings and codified guidelines in US law a few years later.

Foreign Intelligence Surveillance Act (FISA) of 1978. In essence, Congress passed FISA in an attempt to delineate what was and was not permissible after the Nixon Administration attempt to bypass warrant requirements under the rubric of national security.⁵⁰ The US government, by law, does not traditionally spy on its citizens within America. Congress instituted FISA to uphold this law by requiring “the

⁴⁶ Stone, *War and Liberty*, 158.

⁴⁷ Ron Sievert, *Defense, Liberty, and the Constitution: Exploring the Critical National Security Issues of Our Time* (Buffalo, N.Y.: W.S. Hein, 2005), 8.

⁴⁸ Stone, *War and Liberty*, 144.

⁴⁹ Stone, *War and Liberty*, 144.

⁵⁰ Goldsmith, *The Terror Presidency*, 73, 144.

President and his subordinates, on pain of jail, to get a special court's permission to listen to each electronic communication of suspected foreign agents, including wartime enemies, in the United States."⁵¹ Permission required certifying that "the target of the [intercept] is a foreign power or an agent of a foreign power."⁵² In other words, surveillance within US borders must be for the purposes of foreign intelligence only, and with a warrant to ensure compliance. The Senate Judiciary Committee noted that the "legislation [was] in large measure a response to the revelations that warrantless electronic surveillance ... has been seriously abused."⁵³ In other words, surveillance on American soil still required probable cause and a warrant, though the legislation provided for a special Foreign Intelligence Surveillance Court that would oversee the request for warrants.⁵⁴ This court would be able to apply checks and balances to the process of searches, but without public oversight. Some applauded this effort, but others considered a secret court no better than unwarranted searches. The Supreme Court would again weigh in on the interaction between technology and the right to privacy just before 9/11.

Kyllo v. United States (2001). In this case, just months before the terrorist attacks, the issue revolved around the government's use of a thermal imager to search a suspected marijuana grower's house from the outside. The court "held that the Fourth Amendment forbade the government's use of certain thermal imaging technology to discern the heat levels in a home."⁵⁵ In other words, "the Supreme Court held that the reasonable expectation of privacy could not be determined by the

⁵¹ Goldsmith, *The Terror Presidency*, 66.

⁵² Sievert, *Defense, Liberty, and the Constitution*, 9.

⁵³ Stone, *War and Liberty*, 145.

⁵⁴ Stone, *War and Liberty*, 145.

⁵⁵ Darmer, Baird, and Rosenbaum, *Civil Liberties Vs. National Security*, 13.

power of new technologies.”⁵⁶ Thanks to 9/11, the PATRIOT Act would soon alter this balance between technology and privacy under the banner of national security.

All of the events described above, including the Supreme Court’s reinterpretation of the Fourth Amendment, *United States v. United States District Court* (1972), the 1978 FISA Act, and *Kyllo v. United States* (2001) shaped the environment in 2001 of a balance favoring civil liberties, particularly the right to privacy, regardless of decreased effectiveness or technological advances. After 9/11, this balance shifted dramatically.

PATRIOT Act (2001). The single greatest impact to domestic civil liberties as a result of 9/11 was the PATRIOT Act of 2001. Relative to the traditional pace of Congressional legislature and the length of the bill, Congress passed the “Uniting and Strengthening America by Providing Appropriate Tools to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001,” practically overnight.⁵⁷ “The bill was never the subject of a Committee debate or mark-up in the Senate. There was a truncated process in the House, which heard no official testimony from opponents of the bill but at least held a full Committee mark-up.”⁵⁸ This is even more surprising given the considerable length of the bill. In comparison to the Alien and Sedition Act of 1798 which required only a handful of parchment sheets, the PATRIOT Act consumed 131 typed pages. In an effort to pass legislation quickly, the House and Senate passed slightly different versions of the bill, but skipped the standard convening of a conference committee to reconcile the two versions.⁵⁹ On 26 October 2001, the President signed the bill, creating Public Law 107-56, just over six weeks after the attacks.

⁵⁶ Darmer, Baird, and Rosenbaum, *Civil Liberties Vs. National Security*, 77.

⁵⁷ Cole and Dempsey, *Terrorism and the Constitution*, 151.

⁵⁸ Cole and Dempsey, *Terrorism and the Constitution*, 151.

⁵⁹ Cole and Dempsey, *Terrorism and the Constitution*, 151.

The PATRIOT Act created “an overnight revision of the nation’s surveillance laws that vastly expanded the government’s authority to spy on its own citizens and reduced checks and balances on those powers, such as judicial oversight.”⁶⁰ Some believe that the FBI leveraged the terrorist attacks as an opportunity to “roll back unwanted checks on its power.”⁶¹

The 2001 PATRIOT Act contained 10 Titles: domestic security, surveillance, international money laundering, border protection, investigations, victims of terrorism, information sharing, criminal laws, intelligence, and miscellaneous.⁶² The first two are particularly relevant to this thesis.

Title I of the PATRIOT Act, entitled “Enhancing Domestic Security against Terrorism,” addressed issues including counterterrorism funding, FBI funding, and an electronic crime task force. As mentioned earlier, it also addressed the desire to limit racial profiling in the restriction of civil liberties.

Title II of the PATRIOT Act, entitled “Enhanced Surveillance Procedures,” loosened the restrictions on domestic surveillance requirements with sweeping changes to US Code and the Foreign Intelligence Surveillance Act of 1978. Title II authorizations enabled federal agencies “to intercept wire, oral, and electronic communications relating to terrorism ...; seize voice-mail message pursuant to a warrant; issue subpoenas for records of electronic communications; delay notice of the execution of a warrant (sneak and peek), and the authority to serve, nationwide, search warrants for electronic surveillance.”⁶³

The following table depicts some of the more controversial changes to US Code and FISA via Title II of the PATRIOT Act.

⁶⁰ Darmer, Baird, and Rosenbaum, *Civil Liberties Vs. National Security*, 65.

⁶¹ Darmer, Baird, and Rosenbaum, *Civil Liberties Vs. National Security*, 65.

⁶² Public Law 107-56; 115 Stat. 272-275.

⁶³ Ball, *The USA Patriot Act of 2001*, 51.

Table 1: Notable Sections of the USA PATRIOT Act of 2001

Section	Subject	Comments
206	Roving Surveillance Authority	Amended FISA to permit “roving surveillance authority” making it legal to follow one suspect, whatever instrument he or she uses.
213	Delaying Notification of the Execution of a Warrant	Permitted searches while delaying service of a warrant if such action would adversely affect an investigation.
214	Pen/trap Authority Under FISA	Expanded Fourth Amendment exception for spying that collects “addressing” information about origin and destination of electronic communications.
215	Access to Records Under FISA	Expanded the government’s ability to look at records held by third parties for an individual’s activities.
218	Intelligence Searches	Expanded narrow exception to Fourth Amendment that had been created for the collection of foreign intelligence.

Source: Selections from “How Patriotic Is the Patriot Act?” by Amitai Etzioni and “Surveillance under the USA Patriot Act” by the American Civil Liberties Union, www.aclu.org/national-security/surveillance-under-usa-patriot-act

Ronald Sievert, author of *Defense, Liberty, and the Constitution: Exploring the Critical National Security Issues of Our Time*, saw little of concern in the PATRIOT Act. His argument was that the media blew the PATRIOT Act out of proportion. In his estimation, “There were no new legal concepts in the Act.... Much of the furor was actually caused by ignorance of the legislation, some clear misrepresentations of its provisions, and, of course, good old-fashioned politics.”⁶⁴ In his view, the

⁶⁴ Sievert, *Defense, Liberty, and the Constitution*, 76.

PATRIOT Act simply corrected loopholes created by evolving technology by extending surveillance capabilities to Internet communications.⁶⁵

However, to many others the PATRIOT Act fundamentally changed the nature of domestic surveillance by easing probable cause requirements. “The PATRIOT Act liberalized use of the federal government’s four main tools of surveillance: wiretaps, search warrants, subpoenas, and pen/trap orders (which allow investigators to log and map all the telephone numbers called by a suspect).”⁶⁶ As the ACLU points out, the previous requirement for probable cause is now only a “broad assertion that the request is related to an ongoing terrorism or foreign intelligence investigation.”⁶⁷ By simply certifying that a subpoena, search warrant, pen/trap register, or wiretap is for “foreign intelligence” reasons, Fourth Amendment rights disappear. The potential for abuse by governmental agencies is significant, which explains the sunset expiration for multiple sections within Title II of the PATRIOT Act.⁶⁸

Stephen J. Schulhofer also argued that the PATRIOT Act “undermine[d] checks and balances by giving investigators new authority to track Internet usage and to obtain previously confidential financial records *without having to demonstrate probable cause or obtain a judicial warrant*” (emphasis added).⁶⁹ Geoffrey Stone also portrayed the PATRIOT Act as going too far. In his opinion, “The PATRIOT Act failed to require adequate executive branch accountability, undermined traditional

⁶⁵ Sievert, *Defense, Liberty, and the Constitution*, 82.

⁶⁶ Darmer, Baird, and Rosenbaum, *Civil Liberties Vs. National Security*, 116.

⁶⁷ “Surveillance under the USA Patriot Act,” American Civil Liberties Union, www.aclu.org/national-security/surveillance-under-usa-patriot-act, (accessed 23 March 2011).

⁶⁸ Public Law 107-56, Sec. 224. “Sunset” refers to a date a law ceases, unless further extended by Congress. In the PATRIOT Act, sections 203, 205, 208, 210, 211, 213, 216, 219, 221, and 222 contained a sunset date of 31 December 2005.

⁶⁹ Darmer, Baird, and Rosenbaum, *Civil Liberties Vs. National Security*, 91.

checks and balances, and ignored the principle that government restrictions of civil liberties should be narrowly tailored.”⁷⁰

The American Civil Liberties Union (ACLU) claimed section 215 of the PATRIOT Act alone violated the Constitution in four key ways as depicted in table 2.

Table 2: ACLU Claims for Section 215 of the USA PATRIOT Act

<ul style="list-style-type: none">• Violates the Fourth Amendment, which says the government cannot conduct a search without obtaining a warrant and showing probable cause to believe that the person has committed or will commit a crime.• Violates the First Amendment’s guarantee of free speech by prohibiting the recipients of search orders from telling others about those orders, even where there is no real need for secrecy.• Violates the First Amendment by effectively authorizing the FBI to launch investigations of American citizens in part for exercising their freedom of speech.• Violates the Fourth Amendment by failing to provide notice – even after the fact – to persons whose privacy has been compromised. Notice is also a key element of due process, which is guaranteed by the Fifth Amendment.
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Source: “*Surveillance under the USA Patriot Act*” by the American Civil Liberties Union, www.aclu.org/national-security/surveillance-under-usa-patriot-act

The debate over the constitutionality of the PATRIOT Act is ongoing. In its defense, Ronald Sievert points out that, “not one significant challenge to the PATRIOT Act has been upheld by an appellate court.”⁷¹ However, as the previous case studies have shown, this may be more a function of the timing than the validity of the legislation. Even with the extended powers from the PATRIOT Act, at times the Bush Administration exercised additional emergency war powers.

⁷⁰ Stone, *War and Liberty*, 131.

⁷¹ Sievert, *Defense, Liberty, and the Constitution*, 97.

Emergency Executive Powers. Immediately after the 9/11 attacks, US Attorney General John Ashcroft authorized the FBI to conduct an investigation, named “PENTTBOM.”⁷² In all, the FBI detained 762 aliens, rounded up between 11 September 2001 and 6 August 2002.⁷³ Of those detained, the most common nationalities were from Arab countries, including Pakistan, Egypt, Turkey, Jordan, and Yemen.⁷⁴ In the end, the Justice Department inquiry into the 9/11 detentions noted little effort to “distinguish the aliens arrested as the subjects of PENTTBOM leads or where there was evidence of ties to terrorism from those encountered coincidentally to such leads with no indication of any ties to terrorism” as well as “significant problems with the way the September 11 detainees were treated.”⁷⁵ However, the report also noted that nearly all of those detained “violated immigration laws, either by overstaying their visas, by entering the country illegally, or some other immigration violation.”⁷⁶ Though some detentions lacked a connection to terrorism, all of the detentions resulted from individual investigations rather than mass detentions based on ethnicity or religion alone.

FBI Interviews. The FBI sought to interview large numbers of people based on nationality rather than ethnicity or religion. In late 2001, US attorneys sent letters to roughly 5,000 men in the United States on non-immigrant visas from countries with connections to al-Qaeda.⁷⁷ The letters asked the individuals to report to FBI offices for interviews, in order to “find out if the men had information the government might use in thwarting future attacks.”⁷⁸ Amitai Etzioni, author of *How Patriotic Is the Patriot Act?*, concluded that, “It is fair to

⁷² “The September 11 Detainees.”

⁷³ “The September 11 Detainees.”

⁷⁴ “The September 11 Detainees.”

⁷⁵ “The September 11 Detainees.”

⁷⁶ “The September 11 Detainees.”

⁷⁷ Etzioni, *How Patriotic Is the Patriot Act*, 33. Non-immigrant visas include those on work, tourist, or student visas.

⁷⁸ Etzioni, *How Patriotic Is the Patriot Act*, 33.

assume that there were some bad seeds among these men, and that interviews might help ferret them out or scare them into leaving the country.”⁷⁹

Total Information Awareness Project. In January 2002, the Defense Advanced Research Projects Agency (DARPA) developed the Total Information Awareness (TIA) project.⁸⁰ The Information Awareness Office’s motto was “Scientia Est Potentia” – “Knowledge is Power.”⁸¹ Using advanced technology, the government would be able “to identify people with just a photo and to automatically track people as they travel in public space.”⁸² The technology used would aggregate private information like never before. As noted in a *Washington Post* editorial, “The potential for abuse is enormous.”⁸³ The project ended in March 2003, when it lost Congressional funding “thanks to popular outcry against the project,” because of its threat to civil liberties.⁸⁴

Terrorism Information and Prevention System. The Terrorism Information and Prevention System (TIPS) program intended to “turn one in every twenty-four Americans into a snitch. The idea, proposed in earnest by Attorney General Ashcroft in 2002, was to recruit meter readers, UPS drivers, and letter carriers to report on ‘suspicious activities’ they witnessed while inside homes.”⁸⁵ The initiative “was ripped to pieces by everyone from the mainstream press to the post office, delivery firms, and utility companies it was to rely on.”⁸⁶ After objections by Congress, Ashcroft withdrew the proposal.⁸⁷

⁷⁹ Etzioni, *How Patriotic Is the Patriot Act*, 33.

⁸⁰ Darmer, Baird, and Rosenbaum, *Civil Liberties Vs. National Security*, 119.

⁸¹ “Total Information Awareness,” *The Washington Post*, 16 November 2002.

⁸² Darmer, Baird, and Rosenbaum, *Civil Liberties Vs. National Security*, 119.

⁸³ “Total Information Awareness.”

⁸⁴ Darmer, Baird, and Rosenbaum, *Civil Liberties Vs. National Security*, 119-120.

⁸⁵ Darmer, Baird, and Rosenbaum, *Civil Liberties Vs. National Security*, 120.

⁸⁶ Darmer, Baird, and Rosenbaum, *Civil Liberties Vs. National Security*, 120.

⁸⁷ Stone, *War and Liberty*, 132.

Special Registration Program. On the first anniversary of the 9/11 attacks, Ashcroft announced a special registration for foreign nationals of certain designated countries.⁸⁸ Registration applied to foreign nationals of 25 different countries in four groups. These countries included: Iran, Iraq, Libya, Sudan, Syria, Afghanistan, Algeria, Bahrain, Eritrea, Lebanon, Morocco, North Korea, Oman, Qatar, Somalia, Tunisia, United Arab Emirates, Yemen, Pakistan, Saudi Arabia, Bangladesh, Egypt, Indonesia, Jordan, and Kuwait.⁸⁹ Some Congressmen protested this action, claiming “grave doubts about whether the INS’s implementation of [National Security Entry-Exit Registration System] NSEERS has struck the proper balance between securing our borders on the one hand and respecting the civil liberties of foreign students, businesspeople, and visitors who have come to our nation legally on the other.”⁹⁰

PATRIOT Act II (2003). In 2003, the Justice Department circulated plans for what would have been the PATRIOT Act II. The proposal was entitled the Domestic Security Enhancement Act of 2003.⁹¹ The proposed law would weaken surveillance oversight, established a robust DNA database, ease restraints on gathering intelligence on religious and political organizations, and authorized the government to “keep secret the identity of anyone detained in a terror investigation—including American citizens.”⁹² Furthermore, the draft legislation made it harder for Americans to obtain knowledge about governmental actions

⁸⁸ Department of Justice, "Special Call-in Registration Procedures for Certain Nonimmigrants." Immigration and Naturalization Service, www.ice.gov/doclib/nseers/CALL_IN_ALL.pdf (accessed 17 March 2011); Maia Jachimowicz and Ramah McKay, "'Special Registration' Program." Migration Policy Institute, www.migrationinformation.org/usfocus/display.cfm?ID=116 (accessed 17 March 2011).

⁸⁹ Jachimowicz and McKay, "'Special Registration' Program."

⁹⁰ "Members of Congress Protest Special Registration." Law Offices of Carl Shusterman, www.shusterman.com/specialregistrationprotest.html (accessed 23 March 2011).

⁹¹ Stone, *War and Liberty*, 132.

⁹² Stone, *War and Liberty*, 132.

by prohibiting use of the Freedom of Information Act to gain information.⁹³

The PATRIOT Act II suffered widespread criticism by the public, press, and Congress for its attack on civil liberties. As noted by Howard Ball, both liberal and conservative organizations criticized the proposal as “more of a bad thing” and pressured Congress to vote against it.⁹⁴ Eventually, the Bush administration killed the initiative.⁹⁵

The Aftermath

The aftermath to the post-9/11 terrorism threat may indeed never occur. Even with Osama bin Laden dead, the threat of terrorism will never go away. When will the public feel that the threat has subsided enough to demand the restoration of civil liberties? Despite the uncertainty of the threat, this has already happened to some degree.

With no significant attacks since 9/11, sentiment among “the public and Congress began swinging in the opposite direction” when the PATRIOT Act went up for renewal.⁹⁶ Although the 2001 bill passed Congress with a vote of 98 to 1 in the Senate and 357 to 66 in the House, renewal in early 2006 passed with a vote of 89 to 10 and 280 to 138.⁹⁷ Furthermore, nine of the 10 nay votes by Senators in 2006 were from Democrats who originally voted yea in 2001 (the 10th nay vote was by Senator Russ Feingold who was the only nay vote in 2001). In the House, the percentage of nays by political party increased in both parties, including several Democrats and Republicans who voted for the

⁹³ Ball, *The USA Patriot Act of 2001*, 124.

⁹⁴ Ball, *The USA Patriot Act of 2001*, 124.

⁹⁵ Stone, *War and Liberty*, 132.

⁹⁶ Etzioni, *How Patriotic Is the Patriot Act*, 38.

⁹⁷ Ken Adachi, "Senate and House Vote Roll Call on U.S. Patriot Act 2001 & 2006," Educate-Yourself.org, www.educate-yourself.org/cn/patriotact20012006senatevote.shtml (accessed 21 March 2011). Numbers do not reflect Congressmen not voting. Both the House and Senate contained more Republicans in 2006 than in 2001.

bill in 2001. The voting figures indicated decreasing legislative support for the PATRIOT Act.

Additionally, growing unrest about the infringement of civil liberties led almost 400 cities and counties in forty-seven states to create local and state ordinances opposing elements of the Patriot Act. The state legislatures of Alaska, Colorado, Hawaii, Idaho, Maine, Montana, and Vermont voted to oppose sections within the PATRIOT Act.⁹⁸

The Pattern

The familiar pattern of sacrificing civil liberties in the interest of national security appeared in this case study as well. The threat became readily apparent on 9/11, with al-Qaeda taking center stage and the concern for future attacks by radical Islamic terrorists within the United States, possibly including WMD, inciting fear in most Americans. For an elected official, the greatest fear is that a tragedy occurs a second time. In the words of President Bush to Attorney General Ashcroft on 12 September 2001, the mandate was clear, "Don't ever let this happen again."⁹⁹

The 9/11 Commission Report reiterated this message to the administration. As noted by Jack Goldsmith, former head of Office of Legal Counsel for President Bush, the 9/11 Commission's "finger-wagging" highlighted that the American people would hold the President accountable for not stopping a second attack. The chorus from "pundits of all stripes" called for an approach that was more creative and less cautious.¹⁰⁰

The opportunity for othering existed along the ethnic and religious identities of the terrorists. Arabs and Muslims in American were a very small minority. However, the political environment prevented othering of

⁹⁸ Matthew J. Biewer, "Crisis on the Homefront: Our Misguided Efforts to Secure America" (Air Command and Staff College, Air University, 2007), 4.

⁹⁹ Goldsmith, *The Terror Presidency*, 74-75.

¹⁰⁰ Goldsmith, *The Terror Presidency*, 74.

Arab and Muslim-Americans. Thus, Arab and Muslim-Americans who stood out as a minority could hide in what Jack Goldsmith called a “human rights culture.”¹⁰¹

In a familiar pattern, detentions of aliens did occur, but under completely different guidelines than before. Put in perspective, 762 aliens detained as a result of individual leads, tips, and investigations is a far cry from the roughly 110,000 Japanese interned after Pearl Harbor strictly on the basis of their heritage. This indicated how much the political environment had changed since the 1940’s.

Given the inability to “other” radical Islamic terrorists further and the unwillingness to “other” the greater Arab and Muslim populations with which they were associated, the only real option was to target the entire population, though nearly invisibly, through electronic surveillance. The response, from a domestic perspective, greatly altered previous notions of privacy for all Americans. The PATRIOT Act, passing quickly through Congress, significantly loosened restrictions on surveillance laws. Similar to the 1798 Sedition Act, the act targeted the threat through speech; however, these actions targeted private speech on telephones, faxes, and emails rather than public speech.

Several scholars remained unconvinced by the government’s argument that only the criminals should worry about invasion of privacy. The line of thinking went, “Why would you care about being watched if you’re not a criminal and the only thing the watchers care about is whether you are? If you’re engaging in unlawful acts, then you have no right to hide your illegal behavior, and if you’re not engaging in unlawful acts, then you have nothing to fear from surveillance.”¹⁰² Yet, if privacy is valued for its own sake, as it should be, then government should protect privacy as an end unto itself.

¹⁰¹ Goldsmith, *The Terror Presidency*, 54.

¹⁰² Stone, *War and Liberty*, 159-160.

The language following 9/11 put the fight against terrorism into the context of war and with indefinite duration. As phrased by Howard Bell in the introduction to his handbook on the PATRIOT Act, "In this war against terrorism, there is no perceived, reasonable end to the battles given the fanaticism and hatred of the terrorist."¹⁰³ Without an end in sight, there is no opportunity to restore those civil liberties restricted during the threat. Slowly, but surely, progress is being made in the war on terrorism, as evidenced by the May 2011 death of Osama bin Laden.

In February of 2010, President Barack Obama extended three provisions within the PATRIOT Act, but only for one year.¹⁰⁴ Then, in February of 2011, President Obama signed a three month extension to the same three provisions of the PATRIOT Act after an earlier attempt to fast-track a nine month extension failed to garner enough House votes for the required super majority.¹⁰⁵ The decreasing time frame for extensions and increasing selectiveness of the sections extended show the continuing trend of a reduced tolerance for the loss of civil liberties, which will likely continue until all questionable provisions of the PATRIOT Act disappear.

Conclusion

Although American Special Forces finally found and killed Osama bin Laden on 1 May 2011, terrorism does not end with his death. Al-Qaeda has morphed into both "a virtual movement" as well as "a

¹⁰³ Ball, *The USA Patriot Act of 2001*, xv.

¹⁰⁴ "Obama Signs Extension of Patriot Act," USA Today, www.usatoday.com/news/washington/2010-02-27-Patriot-Act_N.htm (accessed 22 March 2011). The three sections extended included: 1) roving wiretaps for surveillance suspects, 2) seizing records related to anti-terrorism operations, 3) "lone wolf" surveillance against an individual that may not belong to an organized terrorist organization.

¹⁰⁵ John Bresnahan and Jake Sherman, "GOP Struggles for Patriot Act Votes," Politico, www.politico.com/news/stories/0511/54799.html (accessed 18 May 2011).

traditional hierarchical organization.”¹⁰⁶ However, the government’s response to the threat of post-9/11 radical Islamic terrorists appears to be repeating the traditional pattern of balancing civil liberties with national security but bearing the burden of contextual changes.

The horrifying attacks of 9/11 revealed the reality of foreign terrorist threats within US borders. The American public demanded a response and most Americans were willing to sacrifice civil liberties for greater security against terrorism. Although some measures targeted foreign nationals from countries with connections to al-Qaeda, there were no large-scale actions against Arab and Muslim-Americans like previous actions against Japanese-Americans in World War II or American communists during the Second Red Scare.

This restraint speaks volumes about the change in the political context, demonstrating the new baseline for tolerance, but creating new dilemmas for politicians eager to demonstrate their willingness to respond to a crisis. As a result, othering against invisible terrorists was impossible and othering against Arab and Muslim-Americans was politically untenable. Much of the othering occurred overseas in military operations in both Afghanistan and Iraq, but domestically the only option available was a broadly applied response, casting a net over all and assuming it affected only the guilty. In reality, it affected everyone.

Technology makes these infringements easier to tolerate. In 2010, 91 percent of Americans had cell phones.¹⁰⁷ Just over 77 percent use the internet.¹⁰⁸ Estimates project that 164 million Americans, 67% of

¹⁰⁶ Audrey Kurth Cronin, *How Terrorism Ends: Understanding the Decline and Demise of Terrorist Campaigns* (Princeton, NJ: Princeton University Press, 2009), 171.

¹⁰⁷ Chris Foresman, "Wireless Survey: 91% of Americans Use Cell Phones," *Ars Technica*, www.arstechnica.com/telecom/news/2010/03/wireless-survey-91-of-americans-have-cell-phones.ars (accessed 23 March 2011).

¹⁰⁸ "Internet Usage and Population in North America," Miniwatts Marketing Group, www.internetworldstats.com/stats14.htm#north (accessed 23 March 2011).

internet users, will use electronic social media by 2013.¹⁰⁹ The increased transmission of personal data desensitizes people to concerns over privacy. Most users recognize that the internet service provider can access e-mail and web browsing history. Anyone who has had someone pick up a second phone in the house or has picked up a phone and heard bleed-over of the conversation next door understands that monitoring can occur on phone lines, and the technology for maintaining privacy is far from perfect. Anyone who has closed a pop-up window on their computer understands that websites often track online activity. The fact that new technology makes it easier to conduct surveillance *invisibly* without being disruptive, humiliating, or invasive lessens the degree to which people care about an electronic invasion of their privacy.

The reaction by lawmakers, politicians, and the courts to the threat of terrorism was similar to the threat of communism and yet distinct in a few notable areas. In both cases, the perceptible of a threat led to restrictions of civil liberties. However, the response to terrorism was distinct. First, the nature of the political environment made previous control measures politically untenable. Second, the response targeted the entire American population rather than a minority. Third, the growth of technology, and the decreased expectations regarding technological privacy, made electronic surveillance more acceptable than limitations on free speech. Consider, for example, the far more prevalent outcry over airport scanners considered invasive and humiliating rather than concern over the ability for intelligence agencies to read e-mails without probable cause. The next chapter examines the distinctions between the threat of communism and terrorism in relation to the balance struck between civil liberties and national security.

¹⁰⁹ Mike Sachoff, "Social Networking Growth Set to Peak," iEntry Corporate, www.webpronews.com/social-networking-growth-set-to-peak-2011-03 (accessed 23 March 2011).

Chapter 4

Analysis and Conclusions

More than half a century elapsed between the end of the Second Red Scare and 9/11. Civil liberties became more important through the civil rights movement and a quicker and more responsive global mass media. However, at the macro level both incidents showed that when the nation is threatened, the balance between civil liberties and national security swings in favor of the latter. America's founders appreciated the need to strike a balance between civil liberties and national security. Through the system of checks and balances devised in the Constitution they sought to safeguard against the pendulum swinging too far in either direction. The proper balance between civil liberties and national security is subjective at best. During times of crisis the balance shifts and civil liberties become a lower priority than national security. The courts often stay silent or even support this behavior, such as in *Korematsu v. United States* or *Dennis v. United States*.

The reason is that national security is a more fundamental need than civil liberties—a nation without security cannot guarantee its civil liberties. A nation must continue to exist before it can question the way in which it exists. Jack Goldsmith quotes Thomas Jefferson on this point: “The laws of necessity, of self-preservation, of saving our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means.”¹ Other presidents have echoed Jefferson's comments during times of crisis. Franklin Roosevelt, too, believed that liberties come second to security, accepting that, “[r]ights come after victory, not before.”² Abraham Lincoln, in his famous

¹ Quoted in Jack L. Goldsmith, *The Terror Presidency: Law and Judgment inside the Bush Administration* (New York: W.W. Norton & Co., 2007), 80.

² Quoted in Goldsmith, *The Terror Presidency*, 44.

speech to Congress explaining his justification to suspend habeas corpus, asked, “Are all the laws, *but one*, to go unexecuted, and the government itself go to pieces, less that one be violated? Even in such a case, would not the official oath be broken, if the government should be overthrown, when it was believed that disregarding the single law, would tend to preserve it?” (emphasis in original).³ Thus, during a threat civil liberties necessarily suffer for the sake of national security. But does the balance swing too far?

Some scholars argue that at times it does. Geoffrey Stone, for example, drew a conclusion that the US government, when threatened, typically goes too far in restricting civil liberties. In his view, an environment of fear often results in panic and overreaction.⁴ David Cole and James Dempsey offered a similar conclusion but instead focus on the ineffectiveness of restricting civil liberties in pursuit of security. Civil liberty restrictions, therefore, cause more harm than good.⁵ In contrast, Amitai Etzioni noted that not only is the restriction of civil liberties the result of a democratic political process, but that a firm reaction reassures the public and bolsters faith in the democracy.⁶ He countered the traditional “slippery slope hypothesis” that views the loss of civil liberties as a process that gradually gains momentum until “the entire institutional structure on which democracy rests tumbles down the slope with nobody able to stop it.”⁷ The courts provide another brake, guarding against the slope getting too slippery.

³ Abraham Lincoln and Thomas Harry Williams, *Abraham Lincoln: Selected Speeches, Messages, and Letters* (New York: Rinehart, 1957), 156.

⁴ Geoffrey R. Stone, *War and Liberty: An American Dilemma: 1790 to the Present* (New York: W.W. Norton, 2007), 175, 180.

⁵ James X. Dempsey and David Cole, *Terrorism & the Constitution: Sacrificing Civil Liberties in the Name of National Security*, 2nd ed. (Washington, DC: First Amendment Foundation, 2002), 179-180.

⁶ Amitai Etzioni, *How Patriotic Is the Patriot Act?: Freedom Versus Security in the Age of Terrorism* (New York: Routledge, 2004), 12.

⁷ Etzioni, *How Patriotic Is the Patriot Act*, 11-12.

Research Questions

Has the government's pattern for balancing domestic civil liberties against national security changed with the threat of terrorism or is it similar to the government's reaction to the Post-World War II threat of communism? If so, then how and why?

In short, the answer is a qualified yes. Although the overall pattern of response is the same, the nature and extent of the response within that framework is qualitatively different from one case study to the next. First, there is a distinct difference between the threat of communism and terrorism. Second, the results of othering varied between the cases. Furthermore, each response faced a unique strategic context that shaped the character of the response. Finally, the post-9/11 terrorism threat is not resolved.

Overall, the reaction to communist subversion was more narrowly targeted and more aggressive with regard to civil liberties, completely suppressing freedom of speech but affecting a smaller percentage of the population. By contrast, the reaction to 9/11 repressed civil liberties more broadly but also less aggressively, infringing privacy through non-invasive measures, but affecting the general public.

Communism versus Terrorism

A comparison of the two case studies follows, using the construct developed earlier. This theoretical framework, found in figure 1, includes the six phases of threat, othering, response, normalcy, restoration, and remorse. The first comparison is between the varying threats. This is an inherently difficult comparison since no two threats to national security are exactly alike.

The Threat.

At first glance, radical Islamic terrorists would appear to be a greater threat than communist subversion because 9/11 cost thousands of American lives. However, the threat of communist subversion is actually greater for two reasons. First, communism involved greater

stakes than terrorism. Second, the threat of communist subversion made nearly everyone a potential threat while terrorism emanated from a small minority.

The threat of communist subversion put America's constitutional democracy at stake. The fear was not that America would simply suffer an attack, but that it might cease to exist. Coming on the heels of a devastating war, growing Soviet atomic capabilities, and communist expansion around the world, the threat of communism seemed inevitable. However, the threat of subversion was speculative, existing more in theory than in reality.

By contrast, the threat of terrorism had proven itself deadly, but clearly not existential. Terrorists might have been able to kill a few thousand Americans in a single attack, but they posed no threat to America's form of government or sovereignty. The goals of al-Qaeda focused more on coercing US foreign policy in the Middle East than threatening US sovereignty. In this regard, the terrorist attacks of 9/11 stood out from the attacks of Pearl Harbor. Imperial Japanese conventional forces might have attacked the US mainland and fought for a political decision. Al-Qaeda can never hope to achieve this end. The attacks posed no more threat to the integrity of the United States than a large-scale natural disaster.

Both threats came from small numbers of people; there were few communist agents and radical Islamic terrorists operating within the United States. However, there existed a more prevalent perception of a threat from communist subversion. This greater uncertainty led to greater fear.

Anyone could be a communist subversive without even his or her neighbor knowing it. Massive lists sprung up of organizations purported to be spreading communist literature, and there was talk of countless

“colleges, universities, and high schools ... filled with radicalism.”⁸ Skepticism even extended to presidential candidates. Thomas Dewey, desperate in his failing 1944 bid for the presidency, recklessly declared that “the communists are seizing control of the New Deal ... to control the Government of the United States.”⁹ Trials of Americans, like that of Julius and Ethel Rosenberg, for espionage and public hearings by various Congressional committees made communist subversion appear widespread; anti-communism became a “cottage industry.”¹⁰ As Gerald Stone noted, “anyone stigmatized as possibly ‘disloyal’ became a menace to his friends and an outcast to society. More than 11,000 people were fired from federal, state, local, or private employment for alleged disloyalty.”¹¹

By contrast, radical Islamic terrorists did not appear to be everywhere. Arabs and Muslims were less than one-half of one percent of the population. Additionally, they typically socialized only within their minority communities. No one suspected they held positions in the federal, state, or local government. Although communists seemed to be everywhere, terrorists looked to be few and far between. This disparity would lead one to believe that the response would be widespread in the first case and fairly limited in the second. Ironically, the exact opposite occurred.

The Othering

In both cases, the majority sought to carve out a minority to take action against. During the Second Red Scare, this othering applied to communists. It mattered little whether the individual was a communist subversive or just a communist; the two became synonymous. After

⁸ Lisle Abbott Rose, *The Cold War Comes to Main Street: America in 1950* (Lawrence: University Press of Kansas, 1999), 26.

⁹ Lisle Abbot Rose, *The Cold War Comes to Main Street*, 33.

¹⁰ Rose, *The Cold War Comes to Main Street*, 33.

¹¹ Stone, *War and Liberty*, 98.

9/11, othering was neither possible nor desired in the case of Arab or Muslims.

Additionally, communism was a previously acceptable ideology, which made it easier to narrowly target. In many cases, for example, communist political activity was a matter of public record. By contrast, terrorism was never socially acceptable and thus well hidden from plain sight, which made it far more difficult to target. Consequently, the process of othering greatly affected the US government's response and led to an inverse relationship between breadth and severity.

The Response

The response in both cases was a logical extension of the othering that occurred. The othering of communists during the Second Red Scare, meaning the isolation of a minority against which direct action could be taken, enabled harsher but more targeted restrictions to civil liberties than the rejection of othering in the post-9/11 environment, meaning no minority such as Arabs or Muslims was identified against which action could be taken. Ironically, this meant that the greater of the two threats faced the most tailored response while the lesser of the threats faced the more broadly applied restrictions to civil liberties.

During the Second Red Scare, the majority isolated communists by targeting their ideology, virtually outlawing the abhorrent communist political view. This method violated freedom of speech by inferring guilt by association, lumping communists and communist subversives together as one. In a society that highly valued public discourse and political debate, this was a drastic measure. In essence, the US government shut down debate on the merits of communism. Yet, it helped suppress the threat by making overt support for communism practically non-existent. By practically outlawing communism through executive orders and legislation, the government clearly infringed on freedom of speech. The courts supported the actions of the executive and legislative branches.

Against terrorism, targeting ideology proved extremely helpful overseas but had little effect domestically. In the post-9/11 environment, the government targeted terrorists, but could not do so along ethnic or religious lines due to increased sensitivity against discrimination. Thus, the response to 9/11 targeted the population as a whole, primarily by easing restrictions on electronic surveillance in an attempt to gather information that identified terrorists and their networks.

Both responses shared some similarities as well. First, a demand by the public in both cases drove the political process to respond. The 1956 mid-term elections demonstrated a call by the public to respond to the threat of communism. Likewise, public polls after 9/11 showed the desire for government to respond, even if it meant a loss of civil liberties. As long as the people elect their politicians, the voice of the majority dominates. Often, restricting the civil liberties of the minority is a way to appease the majority. During the Second Red Scare, the executive and legislative branches both sought to restrict the rights of American communists, believing that “defending the constitutional rights of non-communists would be sufficient to safeguard the essence of democracy.”¹²

Second, the government framed both responses with nationalism. Consider, for example, the message behind the name of the House Un-American Committee or USA PATRIOT Act. It suggests that anyone opposed to such actions must be un-American. Clever use of nationalism and xenophobia effectively united the majority.

¹² Peter L. Steinberg, *The Great "Red Menace": United States Prosecution of American Communists, 1947-1952*, Contributions in American History (Westport, Conn.: Greenwood Press, 1984), 289-290.

The Aftermath

It is difficult to study the return of normalcy after the threat, the restoration of civil liberties, and at times remorse over those restrictions, because the war on terror continues, perhaps indefinitely. The threat of communism, however, followed this pattern. Although the external threat of communism had not vanished, the internal threat of communist subversion faded as the 1950's progressed. Slowly, Congress, the President, and the courts began repealing policies that prohibited communist organizations.

The rhetoric of war frames the threat of terrorism. The term "Global War on Terror" and military operations in Iraq and Afghanistan support this imagery. Although war-laced rhetoric helps rally public support, it creates additional problems by requiring some conclusion to the "war" to consider the threat averted. In other words, this threat may never disappear and normalcy may not return without first eliminating terrorism, which is a virtually impossible task.

The Pattern

Both case studies followed the same pattern. First a threat presented itself, either gradually during the Second Red Scare, or more immediately in the case of 9/11. Next, the nation narrows its identity through the process of othering. Typically this occurs via the majority isolating some minority associated with the threat. During the Second Red Scare, the nation refined its identity to exclude communists, whether they were subversive or not. After 9/11, the nation rejected othering Arabs and Muslims, despite the possibility that it might mitigate the threat of radical Islamic terrorists. Then, spurred by calls from the public, the government responded to the threat. During the Second Red Scare, the government targeted communists and communist organizations. After 9/11, the government could not target terrorist organizations any more than it had previously. Thus, it used a tactic

similar to the Sedition Act of 1798 and targeted the population collectively.

Over the course of a decade, the Second Red Scare played out as expected with a return to normalcy, restoration of civil liberties, and a degree of remorse over the decisions taken at the time. However, the post-9/11 threat of Islamist terrorists has not yet subsided. Military operations are still ongoing in both Iraq and Afghanistan as a result of 9/11. Furthermore, by framing the threat of terrorism with the rhetoric of war creates an expectation that there will be some distinguishable end. The contradiction between the war-laced rhetoric by the US government and the enduring character of terrorism indicate that its resolution will require far longer than typical threats to national security.

Conclusions

The comparison above leads to some overarching conclusions on balancing civil liberties with national security during times of crisis.

1. Restrictions upon civil liberties often originate as a result of the democratic political process and not in spite of it.

When a threat is present, the public demands a response. Failure to respond adequately to the threat can affect elections. Swift and firm reaction to a threat, even if such action goes farther than actually necessary, reassures the public that elected officials are doing everything they can to protect their constituents. Amitai Etzioni argued this point in his book, *How Patriotic is the Patriot Act?* He pointed out that, “When the government reacted firmly to a major challenge, support for constitutional democracy was sustained rather than undermined.”¹³ A firm response to a threat earns the public’s support of the political process. The 1946 mid-term elections provide a great example. The

¹³ Etzioni, *How Patriotic Is the Patriot Act*, 14.

Republican use of a “hard on communism” image earned Congressional seats because it assured voters of a firm response.

2. Balancing civil liberties and security often occurred at the cost of a minority.

In *The Great Red Menace*, Peter Steinberg concluded that, “In a political democracy all ideas must be permissible, all advocacy should be encouraged. To allow some to set limits for others is to restrict the freedom of everyone.”¹⁴ However, the reality is that democracies work by majority rather than unanimous rule. The majority decides what is permissible and what is not permissible. In the presence of a threat, this calculus becomes more conservative and less risk-averse. In 2008, Major Mike Manor argued in a thesis for the School of Advanced Air and Space Studies that “Americans are continuously willing to give up individual rights in exchange for stricter security measures.”¹⁵ In reality, the majority does not give up its own individual rights, but rather they typically sacrifice the rights of some minority – the “others.” As Howard Ball noted, “Whenever the nation is threatened or goes to war, some groups in the society see their liberty eroded by governmental actions to protect national sovereignty and win the war.”¹⁶

The contrast between these two case studies indicates that the greater ability to “other” a minority leads to more narrowly restricted civil liberties while a lesser ability to “other” a minority leads to broadly restricted civil liberties. However, the growing intolerance against discrimination based on religion, ethnicity, or nationality from which a threat is mostly drawn suggests more broadly restricted civil liberties in

¹⁴ Steinberg, *The Great "Red Menace,"* 290.

¹⁵ Mike Manor, "The Home Front: Civil Rights, American Values, and Public Trust When America Is at War" (School of Advanced Air and Space Studies, Air University, 2008), 53.

¹⁶ Howard Ball, *The USA Patriot Act of 2001: Balancing Civil Liberties and National Security* (Santa Barbara, Calif.: ABC-CLIO, 2004), xiv.

the future. This has already played itself out in airline security, for example, which officially prohibits racial profiling, but instead opts for invasive full-body scans and pat downs on the entire population.

3. The cultural tolerance for restricting civil liberties of a minority has diminished.

Several contextual changes occurred between the Second Red Scare and 9/11 which partially explains the character of the responses. One of the most significant of these was the Civil Rights Movement. Through the nation's internal struggle to remove the contradiction between valuing individual liberties and failing to extend these liberties to segments of the population such as blacks and women, the United States has "come increasingly to celebrate and take pride in our commitment to civil liberties."¹⁷ After a long and somewhat bitter struggle for greater equality, responses that include discrimination along racial, ethnic, sexual, or religious distinctions, such as Japanese internment after Pearl Harbor, are no longer politically tenable.

Another political contextual change was the growing power of the courts. In *The Terror Presidency*, Jack Goldsmith noted this change in political climate after the Nixon administration. Previous presidents "did not worry about being sued or prosecuted, or about defending his actions before a grand jury or an international court. He worried instead about the reaction of the press, the Congress, and most of all, the American people."¹⁸ By 2001, the "permissive legal culture" of the past was no longer recognizable.¹⁹

Finally, the global media and communications played a greater role in 2001 than in the 1950's. The "CNN effect" combined with the growth of the Internet created "powerful monitors and critics of human rights

¹⁷ Stone, *War and Liberty*, 173.

¹⁸ Goldsmith, *The Terror Presidency*, 49.

¹⁹ Goldsmith, *The Terror Presidency*, 49.

abuses.”²⁰ Greater access to timely information from across the globe, in concert with educational institutions, government agencies, and the legal profession built what Geoffrey Stone characterized as “an environment in which citizens are more open-minded, skeptical, critical of their political leaders, tolerant of dissent, and protective of the freedoms of *all* individuals” (emphasis in original).²¹

This change in context reduced discriminatory responses to minorities. For example, foreign aliens required special registration after 9/11, but there was no effort to isolate individuals on the basis of ethnicity or religion alone. Detainments occurred after investigations rather than as stop-gap measures before gathering evidence. Measures to target terrorists, such as those found in the PATRIOT Act, required application across the entire population. Therefore, othering a minority is less likely to occur in the future.

Over the long run, this provides an additional safety mechanism for the balance of civil liberties and national security. If everyone feels the pain then the political process operates to moderate government excess. If a disliked minority has to shoulder the burden then the majority is willing to buy safety even at a disproportionate and irrational cost to that group.

4. Balancing civil liberties and national security is not a “slippery slope.”

A common conclusion in the literature on balancing civil liberties and national security is that the government undervalues civil liberties when it restricts them during times of war. David Cole and James Dempsey, for example, conclude in *Terrorism and the Constitution* that: “With confounding regularity, our government has, in the name of protecting national security, subverted the very rights and liberties

²⁰ Goldsmith, *The Terror Presidency*, 55.

²¹ Stone, *War and Liberty*, 173.

‘which make the defense of the Nation worthwhile.’”²² Likewise, Geoffrey Stone noted in *War and Liberty* that the way in which the United States resolves questions about the balance between individual liberty and national security “speaks volumes about the nature and depth of our commitment to the freedoms that define us as a nation.”²³

These arguments imply that the United States compromises its ideals during times of crisis, and this behavior may make further compromises more likely. Beyond a certain point, it becomes entirely possible that restricting civil liberties can mortally wound a democracy. Without the freedom of speech to criticize the government, or support certain political parties, or report from the perspective of a free press, then the American people, even with free elections, are pawns within a context largely shaped by the government, and certainly not one that is *of the people, by the people, and for the people*.

The “slippery slope” hypothesis embodies this line of thought that Amitai Etzioni refutes in *How Patriotic is the Patriot Act?* In Etzioni’s opinion, there is no “slippery slope,” but rather one with notches, marking how far the government “is willing to go and what is unacceptable in order to avoid slipping to a place one is not willing and ought not to go.”²⁴ Ironically, Geoffrey Stone, one of those most critical of the government’s infringement of civil liberties during times of threat noted that, “The nation’s commitment to civil liberties rebounded, usually rather quickly, sometimes more robustly than before.”²⁵

In the case studies examined here, the evidence does not support the “slippery slope” hypothesis. For example, conviction of the 11 American Communist Party leaders in 1948 did not lead to convictions of 14 California communists in 1957. Likewise, passage of the PATRIOT

²² Dempsey and Cole, *Terrorism & the Constitution*, 2.

²³ Stone, *War and Liberty*, xiii.

²⁴ Etzioni, *How Patriotic Is the Patriot Act*, 12.

²⁵ Stone, *War and Liberty*, 169.

Act in 2001 did not lead to passage of the PATRIOT Act II in 2003. In summary, although mortally wounding a democracy might be theoretically possible through the restriction of civil liberties, actual historical examples have so far demonstrated that the founders sufficiently balanced American democratic institutions to prevent this possibility.

5. Courts are not as immune to political pressure as originally intended, particularly during a crisis of national security.

One trend shared among several case studies in this work is the delayed response of the courts. In theory, the courts serve to protect civil liberties from popular pressure. The intent is to protect the minority against the short-lived furor of the majority. Appointing federal judges and chief justices for life terms is one way to generate this independence from political pressure. As noted by Alexander Hamilton in the *Federalist Papers*,

If, then, the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty.²⁶

In many cases, they do just this. However, they sometimes bend to political pressure, by either remaining silent or supporting restrictions on civil liberties in the name of national security.

One reason the courts remain silent is the fear that a decision ignored by the executive weakens the power of the courts. In 1861, for example, Chief Justice Taney rebuked President Lincoln for suspending

²⁶ Alexander Hamilton, "The Federalist No. 78, the Judiciary Department," Constitution Society, www.constitution.org/fed/federa78.htm (accessed 11 April 2011).

habeas corpus, an authority reserved by the Constitution only for Congress.²⁷ However, Taney noted that his legal authority required “faithful execution” by the executive in light of the “superior force” it possessed.²⁸ Lincoln, less concerned with the constitutionality of his actions than the need to respond satisfactorily to the crisis, promptly ignored Taney’s declaration and further suspended the writ of habeas corpus as required.²⁹

Another reason for this behavior by the courts is the belief that the executive and legislative branches are better suited to deal with threats to national security. These insights help explain why the courts supported the military’s discrimination against the Japanese after Pearl Harbor and the discrimination against American Communist Party leaders during the Second Red Scare. Chief Justice William Rehnquist supported this thought, concluding that, “there is some truth to the maxim *Inter arma silent leges*,” or translated from the Latin, “In times of war the laws are silent” (emphasis in original).³⁰

As the Rehnquist noted, there is “a reluctance of courts to decide a case against the government on an issue of national security during a war.”³¹ By framing actions taken as a matter of national security, the courts are reluctant to step in. Supreme Court justices, after all, are still Americans and they, “like other citizens, do not wish to hinder a nation’s ‘war effort.’”³²

6. *Whether or not the response actually safeguards against the threat is often irrelevant.*

²⁷ William H. Rehnquist, *All the Laws but One: Civil Liberties in Wartime*, 1st ed. (New York: Knopf, 1998), 34.

²⁸ Rehnquist, *All the Laws but One*, 34, 38.

²⁹ Rehnquist, *All the Laws but One*, 39.

³⁰ Rehnquist, *All the Laws but One*, 202, 221.

³¹ Rehnquist, *All the Laws but One*, 221.

³² Rehnquist, *All the Laws but One*, 221.

There is often little evidence that action taken to restrict civil liberties during a threat actually helps negate that threat. Of course, the problem with counterfactuals is the difficulty proving what *might* have happened. The point is that whether or not the action taken is effective is of little concern. In a crisis, the public demands a response. As long as the threat does not get worse, the response meets the needs of the public, regardless of whether the two are correlated or not. For example, McCarthyism satisfied the need for a response since there was no communist overthrow of the US government, even if McCarthyism did not actually help. Likewise, the PATRIOT Act satisfied the need for a response to terrorism since there was no sequel to 9/11, regardless of whether or not the PATRIOT Act had anything to do with that.

Chapter 5

Implications and Final Thoughts

In addition to conclusions drawn from comparisons of the case studies, there are implications relevant to balancing civil liberties with national security during times of threat.

Implications

1. A threat creates a dilemma of responding adequately to the fear without exacerbating the threat.

The government responds to threats to meet demands of the people. However, responding lends credibility to that threat. After Pearl Harbor, for example, Roosevelt felt pressure to respond to the Japanese threat. The internment of over one hundred thousand Japanese provided cause to believe the Japanese were a threat. After all, why else would the government have taken drastic action? During the Second Red Scare, for another example, Truman faced a lose/lose situation. Either he did nothing and faced the accusation of being soft on communism, which might cause him to lose the election, or enacted anti-communism programs that fed the hysteria favoring the Republican agenda. Choosing the latter, Truman developed a two-prong strategy based on containment abroad and a loyalty program at home, helping him win re-election in 1948, but also pouring additional fuel on the anti-communist fire that would eventually lead to McCarthyism.¹

Resolving this dilemma requires carefully considering what degree of response will satisfy the public's demand for action while limiting the resultant fear as a result of the reaction itself.

Recommendation: Anticipate this inherent dilemma. Unfortunately, this dilemma is difficult to escape. In fact, lawmakers already carefully consider feedback from the public when determining the extent of the

¹ Geoffrey R. Stone, *War and Liberty: An American Dilemma: 1790 to the Present* (New York: W.W. Norton, 2007), 86-87.

response to threats. If policy attempts to go too far, then it quickly meets resistance from the public, much like the Total Information Awareness Project and the Terrorism Information and Prevention System that rapidly lost support. On the other hand, the public is skeptical of a government that fails to demonstrate it is providing security for its people. This lesson often reveals itself when fighting irregular warfare. The counterinsurgency efforts in Iraq and Afghanistan both focus on providing security to boost legitimacy of the government. The challenge for politicians is listening to the public's feedback so that efforts are recognized but not wasted in fruitless pursuits the public is unwilling to support.

2. Emerging technologies provide new challenges for balancing civil liberties and national security.

Americans increasingly communicate electronically through cell phones, e-mail, and the Internet. These technologies also present greater temptations for the invasion of personal privacy. In both 1972 and 2001, the Supreme Court weighed in on the matter, ruling in both cases that less invasive emerging technological surveillance capabilities do not invalidate the right to privacy.² However, the PATRIOT Act, not yet stricken down by the courts, loosened restrictions for electronic surveillance on all Americans. This study suggests that the public's increasing reliance on information and communication technologies changes expectations in regards to privacy through technological devices. This helps explain the lack of public outrage sufficient to overturn the PATRIOT Act.

Recommendation: Efforts should explore not just how emerging technologies impact national security, but also how the public's expectations for privacy shift as a result of emerging technologies. New

² See chapter three.

technologies provide greater information, but at the price of shrinking privacy. For example, websites target ads to consumers based on the websites they have visited. GPS devices feature ads based on tracking your physical location. Increased interaction with new technologies appears to be affecting the public's expectations for privacy.

In 2010, Google admitted that its Street View cars which collect imagery for web-based mapping software also collected data sent over unencrypted wireless routers. Additionally, the software responsible for collecting user data correlated this information to GPS data from units within the cars.³ Although this incident created some outrage from privacy groups, the public largely ignored it. What was more shocking than Google's admitted "mistake" was that many did not even know this was possible. To further the public's already decreasing expectations for privacy, the government should make it clear that anyone can monitor electronic transmissions. The government should also make it clear that electronic devices do not guarantee privacy. This would make electronic surveillance during times of crisis more plausible.

3. How the government defines the threat impacts how the government responds to the threat.

With the exception of terrorism, all of the case studies in this study lasted no longer than a decade. The war on terrorism is nearing its 10th anniversary with no appreciable end in sight and with sections of the PATRIOT Act still in effect. A war of indefinite duration seriously increases the risk that 'emergency' restrictions will become a permanent feature of American life."⁴ Framing the threat as a "war on terrorism"

³ Chloe Ablanesius, "Google Releases Wi-Fi Sniffing Audit, Is Accused of 'Criminal Act'." PC Magazine, www.pcmag.com/article2/0,2817,2364904,00.asp (accessed 13 April 2011).

⁴ Stone, *War and Liberty*, 130.

encourages prolonged restrictions to civil liberties since we cannot win the war quickly.

Recommendation: Although ideologies are often threatening, the discussion of the threat should be limited to actual entities as much as possible. By targeting ideas, the government creates indefinite periods of threat, since it is extremely difficult to kill an idea. For example, a war on communism or terrorism, or for that matter, drugs, education, or obesity, will never end. However, targeting a particular organization, such as the American Communist Party, Hezbollah, or al-Qaeda is far more promising. As Audrey Cronin pointed out in *How Terrorism Ends*, the idea of terrorism will never die, but all terrorist campaigns eventually do.⁵ Framing the struggle against a more specific threat allows the restoration of civil liberties after mitigating that threat.

4. Actions taken during times of crisis are typically of short duration and reversed after the threat or crisis passes.

Equally important as understanding that the balance between civil liberties and national security shifts during times of threat is the understanding that the balance shifts back after the threat passes. Most of the responses examined in this study came with an expiration date. For example, the Alien and Sedition Acts expired in 1801. Likewise, most of the PATRIOT Act expired at the end of 2005. This is a valuable lesson for future responses.

Recommendation: Actions taken should consider the temporal dimension. Executive orders or Congressional legislation should include an expiration date. This helps ensure restoration of civil liberties as early as possible.

⁵ Audrey Kurth Cronin, *How Terrorism Ends: Understanding the Decline and Demise of Terrorist Campaigns* (Princeton, NJ: Princeton University Press, 2009), 1.

Final Thoughts

A 2008 SAASS thesis by Major Mike Manor suggested further study on a “cycle of wartime tendencies” in the balance between civil liberties and national security.⁶ This study supports Major Manor’s initial findings and expands this idea into a phased model. The six phases in the typical American response to a threat or crisis consist of threat, othering, response, normalcy, restoration, and remorse. However, the most recent case study suggests that othering is no longer part of that process. Further research could expand on this finding. Understanding this cycle of behavior and the context within which this cycle operates helps build an intellectual framework for understanding governmental domestic responses to internal threats.

The balance between civil liberties and national security, though appearing precarious, is actually resilient. The perceived “slippery slope” that continually threatens the balance between these competing interests is actually not so slippery. This is due in part to the long and bitter struggle for civil liberties in peacetime. Who, for example, should vote? Are all men truly free, or just white men? What should be private and what should not? What kinds of free speech and how much of it should be permissible? Our nation has taken over two centuries answering these questions through violent clashes, peaceful protests, and heartfelt debates. This expanding struggle for civil liberties has endeared us to their value. However, the answer to these questions, and others like these, is never fully resolved but instead continually evolves and always lies in the consensus of the majority. In other words, despite the enduring quality of the Constitution, the civil liberties we cherish are always in relation to the current context. There is no permanent answer.

⁶ Mike Manor, "The Home Front: Civil Rights, American Values, and Public Trust When America Is at War" (School of Advanced Air and Space Studies, Air University, 2008), 58.

The demand for security is even more basic than civil liberties because it touches upon a more fundamental need for survival. Even if survival is not threatened, the mere appearance of a threat to survival, rational or irrational, provokes a reaction by instinct alone. Not all threats create a reaction that restricts civil liberties. However, when Americans believe some portion of the threat is internal, such as the case with French loyalists, secessionist sympathizers, Japanese-Americans, communist subversives, and radical Islamic terrorists, restricting civil liberties becomes a common defensive mechanism to fulfill the need to respond.

Thus, the trading of civil liberties for security, regardless of the effectiveness, is an expected byproduct of a functioning democracy. The courts, which protect this balance in peacetime, defer more to American popular opinion to determine the balance during times of threat, which typically results in loss of civil liberties for some minority. However, this trend is changing. Our society today is less acceptable of minority discrimination. Responding to an internal threat now requires measures against everyone or no one.

Finally, actions that suppress civil liberties for the sake of national security are not particularly effective. There is little evidence that McCarthyism prevented attempts at communist subversion or that Japanese-internment prevented any Japanese military attacks or that the PATRIOT Act prevented any terrorist attacks. Further research on the correlation between repressiveness of domestic measures and their effectiveness might also be helpful.

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